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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 19 No. 801

NEIL A. WOODINGTON,

Appellant,

vs.

STATE OF WISCONSIN,

Respondent.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

JURISDICTIONAL STATEMENT

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OPINION BELOW

The judgment and orders of the Circuit Court of Dane County, Wisconsin are not reported. The opinion of the Supreme Court of Wisconsin affirming the judgment of the Circuit Court is reported in 31 Wis. 2d 151 (1965); the per curiam decision of the Supreme Court denying appellant's motion for rehearing is reported in 31 Wis. 2d 151 at page 182 (a). The judgment

of the Circuit Court and the opinion and decision of the Supreme Court of Wisconsin are set forth in the Appendix, infra.

JURISDICTION

Prosecution was instituted against appellant under section 189.19(2)(d) of the Wisconsin Statutes for filing a false and misleading statement with the Department of Securities. It was alleged that the negligence and mens rea clauses of said statute are void for vagueness under the due process clause of the 14th Amendment to the Constitution of the United States. On June 7, 1966, the Supreme Court of the State of Wisconsin decided in favor of the validity of the statute and affirmed the judgment and orders of the Circuit Court for Dane County, Wisconsin, adjudicating appellant guilty under the statute and sentencing him to an indeterminate term of not to exceed three years in the State prison at Waupun, Wisconsin. Appellant's motion for rehearing was denied by a per curiam decision on July 27, 1966. Notice of appeal was filed by appellant on August 5, 1966. Jurisdiction to review a judgment of the highest court of a state by appeal is conferred on this Court by 28 U.S. Code, section 1257(2). That such jurisdiction exists in the circumstances of this case is sustained by the following decisions: Lanzetta v. New Jersey, 306 U.S. 451 (1939); Winters v. New York, 333 U.S. 507 (1948); Gelling v. Texas, 343 U.S. 960 (1952); Lambert v. California, 355 U.S. 225 (1957); Robinson v. California, 370 U.S. 660 (1962); Herndon v. Lowry, 301 U.S. 242 (1937). As to questions other than

the validity of a state statute, jurisdiction to review, by certiorari, the judgment of the highest court of a state is conferred on this court by 28 U.S. Code, section 1257 (3).

STATUTE INVOLVED

Wisconsin Statutes, section 189.19(2) (d):

"189.19 Criminal liability.

.....

"(2) Every director, officer, agent or employe of any issuer and every dealer, agent, investment adviser or other person shall be imprisoned in the state prison not exceeding 5 years, or in a county jail not exceeding one year, or fined not exceeding $5,000, or both, who shall directly or indirectly:

.....

"(d) File or cause to be filed with the department any statement or representation of a material fact, which statement or representation he knows or in the exercise of reasonable care should know to be false or misleading;"

QUESTIONS PRESENTED

1. Whether portions of the state statute under which appellant is charged and which the State Supreme Court declared to be valid

and not repugnant to the Constitution of the United States, are void for vagueness under the due process clause of the 14th Amendment?

2. Whether the pre-trial publicity in this case was so prejudiced and unfair that there is a reasonable likelihood that the appellant did not receive a fair and impartial jury trial?

3. Whether the politically-motivated conduct of agents of the state during the investigative phase of the proceeding amounted to a violation of due process under the 14th Amendment?

4. Whether the main source and generator of pre-trial publicity--the attorney general of the state and his agents--so prejudiced the case of the appellant that the appellant is entitled to a dismissal of the information?

5. Whether the trial court's instructions on a material element of the crime charged constituted a directed verdict as to that element of the crime, thus denying to appellant a trial by jury?

STATEMENT OF CASE

In August, 1964, Neil A. Woodington was a thirty-seven year old Madison, Wisconsin businessman. He was vice-president and a director of Madison American Guaranty Insurance Corporation (hereafter called MAGIC) and president and a director of Allied Development

Corporation (hereafter called Allied), a corporation engaged in several businesses, primarily real estate development, construction, property management and sales, and retailing of building materials and fuel oil. Robert C. Kelly was a business associate of Woodington and was president and a director of MAGIC and vice-president, secretary and a director of Allied. MAGIC was a publicly held corporation, but Allied was closely held with fifty percent of its stock owned by corporations controlled by Woodington and fifty per cent held by Hoard's Creameries, Inc. (hereafter called Hoard's). Kelly was chief executive officer of Hoard's, a well-capitalized distributor of milk products. One company holding a substantial amount of stock in Allied was Brooks & Woodington, Inc. (hereafter called B&W) of which Woodington and Kelly were respectively president and treasurer. Both were directors. Clarence Bylsma was general counsel for MAGIC, Allied and B&W. He was also secretary and a director of MAGIC.

The operations of B&W started in 1953. Both Allied and MAGIC were involved in public stock issues, the second for MAGIC and the first for Allied. Allied's stock offering involved two million dollars while MAGIC's involved one million seven hundred thousand dollars.

Late in August of 1964 the Wisconsin Department of Securities suspended public sale of stock by MAGIC primarily because of interlocking management and mortgage loans to Allied customers by MAGIC which might violate

Wisconsin's conflict of interest laws. An agreement was reached with the Department of Securities whereby Woodington and Bylsma resigned as officers and directors of MAGIC and Bylsma became a director of Allied. Kelly remained as president of MAGIC and as an officer and director of Allied. Just prior to this agreement, the Republican Attorney General, Thompson (hereafter called A.G.), in a letter to Democratic Governor Reynolds, charged that a Democratic appointee, the Commissioner of Insurance, was refusing to cooperate with Thompson in investigating MAGIC and Allied. The Insurance Department was conducting its own examination of MAGIC at the time at the request of MAGIC, preliminary to expansion into other states. Considerable publicity was given to Thompson's letter demanding removal of the Commissioner. The details of this and other public charges by the A.G. that the Insurance Commissioner was covering up for wrongdoing by Woodington, Kelly and Bylsma are set forth at length in Exhibit 11 admitted at the hearing on motions to dismiss prior to trial. From September 2nd until November 6th, the day Woodington was formally charged, the A.G., through press conferences, press releases, and letters to the Governor and newspaper editors, continued his attack upon Woodington and his business associates. The A.G. was then running for reelection against a familiar Wisconsin political name, LaFollette. Other Republican candidates soon took up the A.G.'s charges of corruption in government and protection of "cronies" of the Governor and

the Insurance Commissioner. The Madison newspapers gave these charges front-page treatment throughout the campaign. Since the campaigns were state-wide in nature, the press throughout the state gave the charges broad coverage. Woodington and Bylsma had been active in Democratic politics and their campaign contributions and those of Woodington's attorney were centered upon by the Republican politicians, intimating pay-offs for protection from prosecution if LaFollette were elected.

On September 16th, the change of management described above took place and the Securities Department permitted the resumption of sale of MAGIC stock, noting that no conflict of interest situation had yet arisen but that "the possibility of one" had now been removed. On September 18th the Securities Department suspended the sale of both Allied and MAGIC stock on the grounds that the continuing investigation of the A.G. showed signs of "check kiting" in Allied and that, since Hoard's checks were used, Kelly, as chief executive officer of Hoard's, was involved.

These check kiting charges received banner headlines. Demands were immediately served upon the newspapers and the Director of the Department of Securities for retraction of the charges. On October 3rd, the Director of the Department of Securities sent a letter to the then attorney for Woodington and Kelly stating, "at no time has there been any statement made by this office, either in official publications or in interviews, charging that

either Mr. Kelly or Hoard's Creameries have been engaged in check kiting practices."

On September 30th, in a dramatic press conference, the A.G. signed complaints charging Woodington, Kelly and Bylsma with filing false statements with the Securities Department. The complaints referred to both MAGIC and Allied. The A.G. further announced to the press and television and radio people present that he was turning the complaints over to the Democratic District Attorney (hereafter called D.A.). From that time on, the A.G. and the press made frequent demands that the D.A. take action on the complaints of September 30th. Correspondence which reached the front page of the newspapers was carried on by the A.G. and the D.A., with the A.G. charging that the D.A. was stalling, and the D.A. charging that the A.G. was playing politics. Attacks also continued on the Insurance Commissioner and the Governor for allegedly covering up wrongdoing of Woodington and his associates.

In late October the Republican candidate for District Attorney against the D.A. petitioned for a grand jury investigation of the criminal charges. Three circuit judges heard the petition. It was denied on the grounds that there was no evidence that the prosecuting officers had shirked their responsibilities in handling the complaints. At this hearing, the Deputy Attorney General conceded that the A.G. could have prosecuted those charged and that the complaints which had been

delivered to the D.A. were faulty and would not justify the issuance of a warrant.

The other media of mass communication, television and radio were also involved in the charges and counter-charges about Woodington. For his election campaign, the A.G. prepared a video tape shown over television stations thirty-five times on seven stations covering all areas of the state where television could be seen. The presentation was accompanied by the background music played during the radio and television show entitled "Dragnet" and attacked the Governor and the Insurance Commissioner for political favoritism, and attacked at length the activities of the officers of MAGIC, going into some detail as to political contributions supposedly made to LaFollette. The Republican Party of Wisconsin had prepared, to assist the Republican candidate for District Attorney, a radio tape to be played with the background music, "That Old Black Magic." The broadcast suggested that the D.A. would not take action against the officers of MAGIC.

On November 6th, Woodington and Kelly were named in criminal complaints filed by the D.A. The charge on which Woodington and Kelly were ultimately tried was filing a false and misleading financial statement of Allied with the Department of Securities. The statement was alleged to be false or misleading with respect to the cash item of $224,356 as shown on the balance sheet dated March 31, 1964. This certified balance sheet was prepared after audit by an independent firm of

Certified Public Accountants, Virchow, Krause and Company.

A preliminary hearing began December 9, 1964 and continued for two weeks. At that hearing and later at trial, the State produced accountants who indicated their belief that the cash item was inaccurate for the following reasons:

1. A transfer of $100,000 from Continental Illinois National Bank of Chicago to Allied's bank in Madison did not actually occur until April 1, 1964, although the actual borrowing and all the documents in connection with the borrowing were signed on March 31, 1964. Virchow, Krause & Company had treated the deposit as a deposit in transit, knowing that the deposit had not actually reached the bank until the first of April.

2. Certain checks of Woodington and B&W totalling $168,000 were criticized because some were dated April 1 and the accounts on which they were drawn had, the State contended, "minimum book overdrafts."

3. The opening balance used in reconciling was alleged to be inflated by $100,000 because of check exchanges with Hoard's, although it was conceded by the State that Hoard's had "collected" funds in its account to cover the $100,000 and further conceded that the entries on Allied's books reflected these transactions.

The entire preliminary involved voluminous testimony concerning check kiting and the State attempted to show that kiting had been going on for at least a year before March 31, 1964 and continued for approximately six months thereafter. Woodington and Kelly contended that the Hoard's checks were short-term loans and were drawn on collected funds.

In presenting its case at trial, however, the State dropped completely the use of the word "kiting", probably because it had learned during the preliminary of the authorization of credit by the banks in connection with the check exchanges, and check kiting under most definitions involves the use of unauthorized credit. The defense on cross-examination brought up the prior testimony charging kiting to emphasize the banks' authorization of credit and the change of position by the State.

The preliminary examination (which was made a part of the subsequent pre-trial motion to dismiss the informations) and the trial produced no evidence that the Certified Public Accountants who performed the certified audit were misled in any way by Woodington or any other officer of Allied. Testimony revealed that the Certified Public Accountants were aware of every check in the deposits in transit which were subsequently attacked by the State. There was no charge at any time by the State that the financial statements were false or misleading in any other respect. No charge was made that the net worth of the companies as shown on the balance sheet was inaccurate

or that the profit figures were in any way false or misleading.

The testimony revealed that Allied was the largest builder of apartments in the City of Madison and that at a given time it would have under construction about $1,000,000 in single family construction and about another $1,000,000 in apartments. It had a cash flow of about $1,000,000 a month. It had begun operations in 1962 with $250,000 in cash and $500,000 in property and other assets, with a net worth of $750,000. By March 31, 1964, its assets totalled over $5,000,000. Its operations had been profitable from the very beginning and another $250,000 in cash had been put into the firm in 1963, increasing its net worth to over $1,000,000. The cash item as of March 31, 1964 represented only about 4 1/2% of total assets.

The Securities Department never questioned the cash item on the balance sheet or discussed cash with any officer of Allied in spite of the fact that statements filed with the Department revealed wide fluctuations in cash, and that considerable study was made of the balance sheet and the underlying assets by the Department.

All transactions which should have been reflected on the books of Allied were shown on those books. The certified audit was completed in May of 1964 and filed within minutes of the time it was received by Allied. There was no evidence produced at the trial that any

officer or employee ever misled the auditors or tried to dictate what any of the figures should be.

The evidence was undisputed that the American Exchange Bank in Madison permitted Allied to draw on uncollected funds and that the Commercial State Bank and bank examiners treated the Hoard's checks as the equivalent of cash.

Much of the testimony about check kiting during the preliminary received banner headlines in Madison newspapers and Woodington and Kelly were bound over for trial in December, 1964.

In January of 1965, because of the impairment of credit as a result of the cumulative adverse publicity initially generated by the charges of the A. G., Allied filed a petition for an arrangement with creditors under Chapter XI of the Bankruptcy Act. This arrangement proposed payment of 100 cents on the dollar. At the time of the trial, Woodington was the actual day-to-day operating manager of Allied, and various other related companies. His decisions and actions were subject to veto power by court-appointed receivers. Creditors of Allied voted approximately ten to one in favor of the proposed plan.

On April 9, 1965, a hearing was held on the motion of Woodington and Kelly to dismiss the informations on three grounds:

1. That the activities of the State in conducting the investigation and prosecution of these actions constituted such outrageous misconduct as to be unconstitutional due to violation of the due process clause of the 14th Amendment.

2. That the section of the Wisconsin Statutes under which Woodington and Kelly were charged was void for vagueness.

3. That the magistrate conducting the preliminary examinations did not have jurisdiction to conduct such preliminary examinations.

The trial court denied the motions for dismissal, whereupon Woodington and Kelly sought review of this decision by the State Supreme Court through Writ of Prohibition. The Supreme Court refused to issue the Writ on the grounds that Woodington and Kelly could raise the question on appeal after trial. The void for vagueness question and the pre-trial publicity and conduct of the State was raised on appeal along with other questions.

After trial in July of 1965, Woodington and Kelly were found guilty by the jury. Woodington was sentenced to three years in the State prison and Kelly was placed on probation.

The Federal questions sought to be reviewed are:

1. The void for vagueness question.

2. Prejudicial pre-trial publicity and conduct by the Attorney General and other State agents.

3. Denial of due process in denying appellant a trial by jury because the trial court directed a verdict on a material element of the crime charged.

Questions 1 and 2 were raised April 5, 1965 in motions to dismiss before trial. (R.2) The motions were denied in a decision dated April 22, 1965. (R.3-18) An unsuccessful attempt was made to raise these questions by applying for a Writ of Prohibition to the Supreme Court of Wisconsin by petition dated May 7, 1965. These questions were again raised by motions after verdict to the trial court dated August 4, 1965. (R.38-52) They were presented by appeal to the Supreme Court of Wisconsin, argued on April 18, 1966. (R.100, 116) Question 2 was again presented to the latter court on motion for rehearing denied on July 27, 1966. (R.155)

Question 3 was raised by submitting a request for a jury instructions (R.19, 27) by a motion after verdict dated August 4, 1965 (R.41-45), on appeal to the Supreme Court of Wisconsin argued on April 18, 1966, and on motion for rehearing to the latter denied on July 27, 1966.

In the opinion of the Supreme Court of Wisconsin in this case at 31 Wis. (2d) 151, 183, the Court said:

"...The sentence imposed, upon the record before us, seems quite severe but that fact does not go to the merits of the conviction." (R. 119)

On June 27, 1966, at the same time he moved for a rehearing, Woodington petitioned the Supreme Court of Wisconsin for review of his sentence and moved for stay of execution and for probation. In a brief supporting this petition, the difference of sentences between Woodington and Kelly and the record indicating that the difference appeared to be based solely on resignation of employment with Allied was pointed out, but no constitutional question concerning severity of sentence was presented to any Wisconsin court. The Supreme Court denied this motion. (R. 157)

THE QUESTIONS ARE SUBSTANTIAL

I.

Sec. 189.19 (2) (d) Wis. Stats. Is Void for Vagueness Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

A. Introduction

Chapter 189 of the Wisconsin statutes contains the Securities Law. The negligence clause of Section 189.19 (2) (d) provides in part that every director, officer, agent or employee of any issuer....who shall directly or indirectly....file or cause to be filed with

the Department of Securities any statement or representation of a material fact which statement. . . . in the exercise of reasonable care (he) should know to be false or misleading. . . . shall be imprisoned. . . . not exceeding five years. . . . or fined not exceeding $5,000 or both. This clause is void for vagueness because it fails to give fair warning of criminal consequences to an individual seeking to embark upon a morally ambiguous course of action and it carries the potential of labeling as blameworthy-because-criminal, a person who is in fact morally blameless.

Not only the negligence clause set forth above, but also the mens rea clause is void for vagueness. The mens rea clause provides in part that every director, officer, agent or employee of an issuer... who shall directly or indirectly. . . . file or cause to be filed with the department any statement or representation of a material fact, which statement or representation he knows to be. . . . misleading . . . . shall be imprisoned in the state prison not exceeding five years. . . .

The term "misleading" in the context of this statute refers to no one to whom the statement is misleading, and hence is a statutory category which is void for vagueness within the meaning of the Fourteenth Amendment.

Since the void for vagueness doctrine is complex, and involves consideration of variables, the rationale will be stated with

reference to appropriate cases and then the rationale will be applied to the facts of this case. The most general statement of the vagueness rationale is:

> "That it will not do to hold an average man to the peril of an indictment for the unwise excercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result." Cline v. Frink Dairy Co., 274 U.S. 445, (1927).

Thus, the doctrine focuses upon two distinct yet interrelated factors: (1) the individual at a point in time when he is considering a course of conduct which may be in violation of the law; and (2) the process of adjudication after the individual has embarked upon the course of conduct and that course is challenged as criminal.

The doctrine considers vagueness both as to (1) the standard of liability, and (2) the proscribed behavior.

B. The Negligence Clause

The negligence clause of the statute holds appellant to the standard of liability of "reasonable care". Appellant contends that he is in the same position as the decision makers in U.S. v. L. Cohen Grocery Co., 255 U.S., 81 (1921) who had to decide in

advance whether a particular price was "unreasonable". He is in the same position as the executives in Cline v. Frink Dairy Co., 274 U. S. 445 (1927) who had to decide in advance whether particular relationships with other businesses were motivated by a desire for "reasonable profit". He is in the same position as the executives in Bandini Petroleum Co. v. Superior Court, 284 U. S. 8 (1931) who had to determine whether one technique or another would be more likely to result in "unreasonable waste in oil production." Under the rationale of all these cases, the negligence clause of Section 189. 19 (2) (d) is unconstitutional under the Fourteenth Amendment.

The problem of negligence or reasonable care in the context of a statute such as Section 189. 19 (2) (d) is well stated in the Void for Vagueness Doctrine, 109 U. of Penn. L. Rev. 67 (1960) at page 90.

> ". . . The common fault of the too incomprehensible statute in Lanzetta, the too approximate statute in Cline and the too discretion-giving statute in Gelling (Gelling v. Texas, 343 U. S. 960 (1952)) is that each injects into the governmental wheel so much free play that in the practical course of its operation it is likely to function erratically, responsive to whim or discrimination unrelated to any specific determination of need by the responsible policy-making organs of society - and to result in a significant number of impermissible public-versus-private-interest

resolutions which are beyond the effective discovery or appraisal of the Court." (Citation in parenthesis supplied)

The State argued that the statute is "as definite and certain in these terms as the subject matter will permit". We do not believe that this is true. For example, adding the words in his particular capacity after the words reasonable care in Section 189.19 (2) (d) would make the standard of liability more certain. It would indicate that the standard of liability for an office boy employee would not be the same as that for a company comptroller with many years of accounting experience although both would be held to a standard of "reasonable care".

Adding the words from the standpoint of investment profitability to a reasonably prudent investor after the words false or misleading in Section 189.19 (2) (d) would help clarify the category of proscribed behavior. This would indicate that the statement would have to be false or misleading from an investment profitability standpoint. This should be the concern of the state: that there be no misrepresentation of the desirability of the investment, i.e. its profitability.

It is also important that the statement be false or misleading to a reasonably prudent investor rather than to any one of thousands of potential investors some of whom may not be able to read, to say nothing of understanding a balance sheet.

The statute could be amended so that it would no longer be too vague to afford a practical guide to permissible conduct by clarifying the standard of liability and the proscribed behavior.

C. The Mens Rea Clause

The mens rea clause of Section 189.19 (2) (d) can be analyzed into two separate provisions. (1) It is a crime for a defendant to intentionally cause to be filed a registration statement containing a false statement when the defendant knows its falsity. (2) It is also a crime for a defendant to knowingly file a registration statement containing a misleading statement when he knows it to be misleading. Appellant contends not only that the negligence clause is totally vague but that that portion of the mens rea clause predicating liability upon intentionally filing a misleading statement is also unconstitutionally vague as to the proscribed behavior. Only that portion of the statute which predicates liability upon knowingly filing a false statement is sufficiently precise to be invulnerable to constitutional attack.

Appellant has a right to challenge the vagueness of the provisions described above even if there had been evidence that he could be brought within the knowingly-filing-a-false-statement classification. The language of the statute rather than the proof at trial is the relevant focus when considering a challenge of void for vagueness. Lanzetta v. New Jersey, 306 U. S. 451 (1939). Moreover, a particular defendant may challenge the vagueness of the

statute as applied to certain kinds of persons even though he does not come within that particular category. Winters v. New York, 333 U. S. 507 (1943); Thornhill v. Alabama, 310 U. S. 88 (1940).

The term "misleading" appears in both the mens rea and the negligence clause. Therefore, the vagueness of the latter provision is compounded by applying an indeterminate standard of liability to a referentless category of proscribed behavior.

A vague statutory category is one which could be applied to both blameworthy and blameless conduct given the reference points of the statute. Gelling v. Texas, supra; Lanzetta v. New Jersey, supra.

What is meant by "misleading"? The problem of the misleading statement is always one of context. People are most often mislead by half-truths, or when facts about a situation are omitted, or are presented ambiguously. Whether a statement is misleading depends upon to whom it is addressed. To a person of sophistication about a matter, a statement omitting some details may not be misleading, because his own knowledge may supply the missing facts. To the naive, to leave out such facts may give a totally distorted picture. Whether a statement in a registration application is misleading depends to a large degree upon the sophistication of its addressee.

Must the statement be misleading to the

Director of Securities? In the regulatory scheme of the statutes he plays the critical role in protecting investors by disclosure. No security may be issued without his approval. He brings expert knowledge to his task, under section 189.13, Wis. Stats., he has vast investigatory powers to determine the accuracy of any statement in a registration application and can decide if it is in the public interest to register a security.

Does the term mean misleading to the investor? Certainly his frame of reference is different than that of the director. A registration statement is often of absolutely no value to many securities purchasers, given the complex nature of the statement. As Justice Douglas, (then Commissioner Douglas of the SEC) noted:

> "Those needing investment guidance will receive small comfort from the balance sheets, contracts or compilation of other data revealed in the registration statement. They either lack the training or intelligence to assimilate them and find them useful, or are so concerned with a speculative profit as to consider them irrelevant." Loss, Securities Regulations, Second Edition (1961), Vol. 1, p. 124.

Depending upon the person deemed the addressee of a statement in a registration application, it may or may not be "misleading". The statute itself offers no guidance in identifying the relevant addressee.

From the perspective of the person considering a course of conduct, -- an officer, director, agent or employee of an issuer -- he simply cannot determine whether particular statements will subject him to criminal liability, even if he concluded that a statement might mislead an investor but would not mislead the director. From the regulatory scheme of the statute, it seems reasonable that the director must be misled. Since the Wisconsin Supreme Court has stated in State v. Eisbach, 263 Wis. 554, 47 NW (2d) 725 (1953), that the purpose is to protect investors, we do not know authoritatively in advance whether the director or the investor must be misled. Therefore, a person desirous of complying with the law does not know in which direction to move. If he files the statement, believing it might mislead an investor but not the director and believing that the director is the relevant addressee of the statement under the statute, it would be hard to deem his behavior as anything but morally neutral. Nevertheless, a prosecutor might disagree with him, and persuade a trier of fact that the relevant addressee is an investor who might be misled by any statement in a registration application.

An authoritative construction may come from an appellate court to the effect that the Director is the relevant addressee, but meanwhile the defendant, acting upon a reasonable construction of a referentless category of "misleading" may be subjected to the financial and psychological pressure of a trial and may be financially ruined by the pall that has hung over his business.

For these reasons, the term "misleading" as it appears in both the negligence and the mens rea clause is unconstitutionally vague as to the proscribed behavior.

D. Avoidance of Desirable Activity Because of the Indeterminancy of the Standard of Liability or the Definition of the Proscribed Behavior.

Cases in this Court have not only emphasized the unfairness of an after-the-fact determination of criminality, under an indeterminate definition of proscribed conduct, but have also noted that the person considering a course of conduct may forbear it precisely because of uncertaintites as to his criminal liability. Therefore, it is this consequence of vague statutes, i. e. the curtailment of desirable activity, that has been grounds for their demise.

As the professors of the Washington Law School (who were among those who brought the action in Baggett v. Bullitt 377 U. S. 360 (1964)) were unsure as to whether or not they could criticize the U. S. Supreme Court, after taking an oath to always encourage respect for United States "institutions", so, too, a president of a business concern such as the appellant may resolve the uncertainties by refusing to sign and submit the registration statement until he has clarified all ambiguity. Since "time is of the essence" in a securities issue, the decision to defer may well spell, mediocre performance or worse, for those companies who must finance by going to the securities market. It is

all but impossible for small business to expand significantly out of retained earnings as do most corporate giants. This is a matter of real concern in our economy. If we are committed to an economy of multiple enterprises to preserve economic efficiency, and qualitative individual freedom, then we must be concerned about the fate of small businesses that must rely upon the securities market for financing. Creating a situation paralyzing aggressive business behavior because of uncertainty of criminal consequences, threatens the existence of a pluralistic economy.

E. Inapplicability of the Necessity Doctrine.

In some cases the court has been faced with either sustaining a relatively indeterminate statute or dispensing with any regulation of the subject matter. Under these circumstances the court has sustained the statute, arguing that through construction and other techniques harsh results can be avoided. Because the substantive objective of the regulation was deemed to be desirable, some defendants were required to carry a heavier burden of uncertainty as to the legality of a prospective course of action than is normally the result. The leading case under the necessity rationale is U. S. v. Petrillo, 332 U. S. 1 (1947) which sustained the Lea act making it a crime for any person to require a radio broadcaster to hire persons in "excess of the number of persons employed".

The purpose of Chapter 189, Wis. Stats. is to adjust the balance of power between an individual buyer and an organized seller. The statute gives to the buyer an expert investment counsellor in the form of the Director who apprises him by the fact of registration, that the relationship between the securities and the financial position of the company is such that he will at least get a "run for his money". (The purpose of this statute is not to guarantee to the buyer that his investment will be profitable.) This can obviously be achieved within the present terms of Ch. 189, Wis. Stats. without imposing criminal sanctions upon officers of the issuing company on an indeterminate standard of liability in a referentless category of proscribed statutory conduct.

The most basic regulatory device is set forth in sec. 189.12, the power of the Director to refuse to register a stock if it fails to meet the criteria of sec. 189.13 (3), after the Director has conducted an investigation using the full powers granted to him by sec. 189.13. The investor can be protected without having to arbitrarily place men in prison. Once the stock has been issued, the Department is not then deprived of further sources to protect the investor against buying the "Blue Sky". Section 189.16 authorizes stop orders subsequent to the issuance of securities. Sec. 189.17 (5) grants the Director the power to enjoin further issuance of securities, given a finding of fraudulent activity. Section 189.11 authorizes a total prohibition of sale upon determination of certain fraudulent activities.

Moreover, under sec. 189.18 (4), a securities sale is voidable at the option of the purchaser upon a determination of fraud in any respect relating to the sale.

Appellant does not take the position that criminal penalties are not appropriate under any circumstances. Pursuant to sec. 189.19 (2) (a), Wis. Stats., criminal sanctions can be imposed upon a person for a knowing violation of a precisely detailed order issued by the department. See Yakus v. U.S., 321 U.S. 414 (1944). Certainly a person who violates the terms of this provision is morally blameworthy but it is quite another matter to say that, given this full range of sanctions this state must also place men in prison for five years on standards as indeterminate as those contained in sec. 189.19 (2) (d).

F. Summary

For all these reasons, (1) the negligence clause which imposes liability, if in the exercise of reasonable care a director, officer, employee or agent of an issuer should have known that the registration statement contained a false or misleading statement, and (2) the clause which imposes liability if this affected class knowingly causes to be filed a registration statement containing a "misleading" statement are unconstitutionally vague.

Since the information in this action was predicated upon these clauses, it must be dismissed.

II.

The Pre-trial Publicity primarily generated by the Attorney General was so Prejudiced that There is a Reasonable Likelihood that Appellant did not Receive a Fair and Impartial Jury Trial, and the Activities of the Agents of the State in Generating this Publicity Constituted a Denial of Due Process.

A. Introduction.

A principal issue in this case is prejudicial and unfair pre-trial publicity. This is a case of flagrant abuse of the powers and prestige of his office by the then Republican A. G.. This official was engaged in an election campaign which he subsequently lost. While the A.G.'s office conceded that it had full legal authority to prosecute the appellant, the A.G. apparently elected, as a campaign tactic, to publicly attack public officials of the opposite political party for not charging and prosecuting the appellant and for covering up alleged wrongdoing of appellant.

Most of the pre-trial publicity was generated by the A.G.'s new conferences, news releases, and appearances on radio and TV. Typically, his presentation attacked some Democratic public official for covering up the alleged wrongdoing of the appellant and his companion officers. Republican candidates for United States Senate, governor, lieutenant-governor, and D.A. of Dane County took up the cry of the A.G..

B. Conduct of the Attorney General.

Despite his own authority to prosecute, the A.G., from September 2, 1964 until election day, campaigned in the news media to discredit Democratic candidates on the grounds that they were covering up criminal activities of appellant and others, withholding information and failing to prosecute.

The activities of the prosecution, primarily the A.G., himself, were so violative of the constitutional command that each accused is entitled to a fair trial by an impartial judge and jury, that the charges should be dismissed or, at the least, that a new trial should be granted. In Sheppard v. Maxwell, 384 U.S. 333 (1966) the prejudicial pre-trial publicity was also frequently initiated by the prosecution, but here we have an instance where the prejudicial pre-trial publicity was generated almost entirely and in great volume by activities and statements of the State's chief prosecutor. The appellant here is not relying solely upon a prejudicial pre-trial rationale such as that urged in cases concerned solely with the impact of the content of the publicity upon the judge and jury. Rather, the appellant is directing its attack both on the content of the pre-trial publicity and upon the source of this publicity--agents of the State, particularly the A.G.

Many examples of the pre-trial publicity and its source were presented in the April 9, 1965 hearing on appellant's pre-trial motion to dismiss. The hearing revealed that the A.G.

signed complaints against appellant, Kelly and Bylsma on September 30, 1964, at a dramatic press conference which he called in his office and at which television cameras and newspapermen abounded. This got banner headlines in both Madison newspapers and was carried on television extensively. The A.G. had previously called for the resignation of Insurance Commissioner Manson, which also made front-page headlines in connection with this defendant. The pre-trial proceedings had the aura of a staging for maximum publicity.

The events immediately preceding issuance of the information are most noteworthy. The Democratic D.A. wrote a letter to the Wisconsin State Journal on October 12, 1964. It was printed in full on the front page and detailed the tremendous pressure from the Attorney General to prosecute, stating in part:

> "I was informed by Mr. Cole (Deputy A. G.) that the procedure which they were following had been discussed by them and that their considered opinion was that I, as District Attorney, should be kept hanging 'right down to the wire' and would thereby be 'put in a box' with nowhere to go.
>
> "I suggested that their manner of handling the case seemed to be more guided by publicity and political considerations than by dictates of good prosecutive procedure. I was again told that the Attorney General was purposely putting me in what he considered to be a box." (Parenthetical material supplied.).

On October 13, 1964, the A.G. wrote to the Wisconsin State Journal. He refers to the October 12 letter from the D. A., This letter of the A.G. was printed on October 14th at length in the Wisconsin State Journal. In this letter the A.G. accused the D. A. of playing politics, attacked the Democratic Governor and the Democratic appointee, the Commissioner of Insurance. The A.G. stated in part:

> "Initially, I did hope Mr. Torphy would handle the prosecution of the sworn complaints I made promptly and without regard to politics even though he was Governor Reynolds' political appointee. However, practical consideration indicated he might not. Accordingly, as Mr. Torphy states, I did deliberately attempt to 'put him in a box with nowhere to go' except into the criminal court as a prosecutor. By making public the fact of my sworn complaints I made it impossible for him to allow them to gather dust in his office without being subject to the public pressure so effectively exerted by the Wisconsin State Journal and the Milwaukee Journal."

> "There was another course I could have followed. I could have quietly and privately filed the complaints, waited for the inevitable stall and then made complaint to the Governor. Since the Governor has yet to acknowledge my demand for an investigation of Mr. Manson, except in political speeches to party members wherein he commended Mr. Manson, the futility of following the alternative course was apparent."

An affidavit of counsel for Kelly was admitted into evidence at the hearing on the pre-trial motion to dismiss. As a part of that affidavit, there is contained the audio portion of a televised political advertisement which was part of the A.G.'s campaign. This audio portion was delivered against a background of the music which was played during the well-known radio and television show entitled "Dragnet". This video tape was shown over television stations thirty-five times in seven cities throughout the state just before appellant was charged. These television stations covered all areas of the state where television can be seen. The film had the word "censored" superimposed over a picture of the state capitol. The advertisement attacked "highly questionable financial manipulations by political cronies of Governor John Reynolds and leaders of his campaign committee". It stated that "Insurance Commissioner Manson attempted to keep the scandal buried". It continued, "George Thompson was determined that the Reynolds administration was not to be allowed to cover up possible wrongdoing in Wisconsin as the Johnson administration had buried the Billie Sol Estes and Bobby Baker scandals in Washington. Fighting attempts by Commissioner Manson to block the probe every step of the way, George Thompson began his investigation. This is Attorney General George Thompson. This is his story". The A.G. then appears on the film and, after attacking the Insurance Commissioner, appellant and others, says:

"In my opinion this is an example of the

creeping corruption that can only be cleaned out of Wisconsin's government by returning to full and effective Republican leadership. Won't you please help me?"

At the hearing on the pre-trial motion to dismiss, a substantial amount of the pre-trial publicity was introduced into the record in the form of a scrapbook, which contained newspaper clippings in chronological order and audio and visual tapes of the radio and television publicity of the A.G. The scrapbook received into evidence contains ample evidence of the pre-trial publicity.

Few cases exceed this one in quantum of reported material, prejudice in content and recklessness of conduct. While the A.G. has the duty to investigate crime and make public what he deems necessary to the public interest, the actions of the A.G. in this case were outrageously prejudicial to appellant and patently political--designed to secure his reelection and nothing else. If the A.G. has not exercised his right to inform the public with circumspection so as not to prejudice or impair the right of appellant, the appellant should be granted a dismissal, or at least, a new trial.

The State Supreme Court said:

"If his conduct overstepped the bounds of his legal ethical obligations... proper inquiry could be made by the integrated bar disciplinary procedures under Canon 20 of the 'Canons of Professional Ethics.'"

This would provide no remedy for the appellant. The utterly reckless conduct of the A.G. here demonstrated a complete disregard for the rights of the appellant. This Court should grant a dismissal or direct a new trial.

C. Conduct of other politicians which should reasonably have been foreseen by the A.G.

The political advertising of the A.G. and other candidates for state office, repeating his charges, was state-wide. "FACTS", a Republican newsletter distributed state-wide, having a circulation of just under 30,000, also repeated his charges. Thus the publicity permeated the entire state.

The Wisconsin State Journal, on September 23, 1964, quoted the Republican candidate for Governor as stating that the case "smacks of the Bobby Baker mess in Washington. The Democrat tactics of the national administration are being transplanted to Madison." The Milwaukee Sentinel on that same day quoted that candiate as saying: "The protection of political cronies at the expense of the people has no place in Wisconsin."

The A.G. should have reasonably foreseen that other candidates for political office would pick up his charges. The Republican candidate for the United States Senate, in a statement issued at Oshkosh, Wisconsin, on September 4, 1964, stated that it was a

> ". . . sad day for Wisconsin. We have a rich heritage of clean state government, but, if the Attorney General's allegation concerning the Commissioner of Insurance are true, it means our state has been tainted by corruption. What happened to Governor Reynolds; highly publicized 'code of ethics' for state employees? More important, what has happened to the integrity and moral force that once was the bulwark of Wisconsin government? The issue of corrpution to government--federal and state--is now a major campaign issue."

The candidate for governor attacked the Democratic administration as one of "creeping corruption and ethical dry rot." He mentioned the political contribution of the officers of MAGIC, including the appellant, to the Democratic party.

Radio and advertising executives testified at the hearing on the motion to dismiss that a one-minute "Old Black MAGIC" taped announcement was broadcast eighty-nine times between October 26 and November 1, 1964. It was a campaign advertisement for the Republican candidate for district attorney and the music "That Old Black Magic" provided the background for the commentary. The broadcast suggested that District Attorney Torphy would not take action against MAGIC and stated that John Crawford, the Republican candidate, would make a district attorney that could be trusted. The order for the broadcast was placed by the Republican Party of Wisconsin. The defendant was charged on November 6, 1964.

In headlines of October 12, 13 and 14 in the Wisconsin State Journal, the Attorney General and the Republican candidate for District Attorney demanded action by the D.A. This pressure prevented the D.A., acting in a quasi-judicial capacity, from dispassionately considering whether to prosecute. Appellant was entitled to such consideration as a matter of due process. This is analogous to the pressure for prosecution criticized in Sheppard, where, after acknowledging the important role of the press in the administration of justice, the Court said: at page 350

> "But the Court has also pointed out that legal trials are not like elections, to be won through the use of the meeting-hall, the radio and the newspaper. Bridges v. California, supra, at 271. And the Court has insisted that no one be punished for a crime without 'a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power'. Chambers v. Florida. 309 U.S. 227, 236-237 (1940)." (The citation for Bridges is 314 U.S. 252 (1941).)

Much of the pre-trial publicity dealt with matters which were never put into evidence. A vast amount of the publicity involved the appellant as an officer of MAGIC. He was actually tried as an officer of Allied. Most of the publicity created the impression that the defendant had compromised public officials, who were

withholding prosecution because of political friendships, and that a trial would result in defendant being found guilty of criminal conduct.

If this type of political campaigning, using the defendant as a political pawn, must be permitted under recognized doctrines of free speech, then surely there should be some protection by the courts when the political pawn is charged and brought to trial as a by-product of the political campaigning.

D. Basic objectives to be achieved by the due process decisions.

The Supreme Court utilizes the due process rationale to achieve two basic objectives: (1) to insure reliable fact finding determinations, (2) to affirm the basic value of our society -- individual human worth.

In a concurring opinion in Estes v. Texas, 381 U.S. 532 (1965) Warren, C.J. states at p. 564:

> ". . . the criminal trial under our constitution has a clearly defined purpose, to provide a fair and reliable determination of guilt; and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated."

Where the court has focused directly upon the conduct of the prosecution, there is concern for the reliability of the fact finding determinations.

The basic rationale surrounding the prosecution's affirmative obligation to take steps to create an atmosphere for reliable fact finding has been described in these terms:

> "The principle of Mooney v. Holohan is not punishment of society for the misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain:
>
> > 'The U. S. wins its point whenever justice is done its citizens in the courts.'"

Brady v. Maryland, 373 U. S. 83 (1963)

This Court, at 362, in Sheppard, commented:

> ". . . unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals

> have the duty to make an independent evaluation of the circumstances. . . . The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function."

Here, agents of the State not only failed in their duty to take steps to create an atmosphere of reliable fact finding, but rather undertook a course of action which could have no other effect but to shroud in uncertainty the issue of the fairness of the trial.

The second basic objective of the due process cases is to affirm the basic value of our society--individual human worth. Due process requires that a defendant always be treated as a man rather than as an object to be manipulated for another's purpose. The rationale for excluding confessions has shifted from a concern with the reliability of the confession to a concern with the manner in which the organized power of the State treated the defendant. In Rogers v. Richmond, 365 U.S. 534 (1961), the Court noted that involuntary confessions are excluded:

> ". . . not because such confessions are unlikely to be true, but because the methods used. . . offend an underlying principle in the enforcement of our criminal law; that

ours is an accusatorial and not inquisitorial system--" (page 540)

Appellant was not treated as a man entitled to a forthright face to face confrontation during the investigative stage of this proceeding, but as a pawn to be manipulated as a means to an end, and specifically a political end--the re-election of the then attorney general.

E. Dismissal is an appropriate remedy, but, at least, appellant is entitled to a new trial.

In arguing for dismissal as the appropriate remedy the appellant makes the following points:

It is obvious that a repetition of the prosecution's behavior can be deterred only if its consequence is a total denial of prosecution. A man bent on manipulating defendants as a means to political victory may be undismayed by the fact that his conduct will result in requiring the State to pursue successive prosecutions until they find triers of fact unaffected by the conduct or until the State can obtain legally sufficient evidence which is not tainted by the conduct. However, freezing the prosecution at the threshold, shifting some of the responsibility for relieving potentially guilty persons of liability to agents of the State, may cause prosecutors to think carefully before embarking upon a campaign of manipulation.

An example where the court found dismissal an appropriate remedy for improper activities on the part of agents of the State was State v. Cory, 62 Wash. (2d) 371, 382 P. (2d) 1019 (1963).

There the sheriff eavesdropped on a conference with defendant and his counsel. The court indicated that granting of a new trial would be an inadequate remedy. It cited the following language from Coplon v. U.S., 89 U.S. App. D.C. 103, 191 F (2d) 749 (cert. den. 342 U.S. 926) (1951):

> ". . .No conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel, or any other element of due process of law without which he cannot be deprived of life or liberty."

In effect, the State's conduct constituted an executive "Bill of Attainder". Appellant was singled out for prosecution in much the same way the English parliament "outlawed" persons who were political opponents of the existing regime. It was this result which the framers of the Constitution sought to avoid by Article I, Section 9, Clause 3 of the U.S. Const., denying to the Congress the power to enact bills of attainder. Although formally this provision does not apply because we are not dealing with an act of the legislature, by analogy the State's conduct in this prosecution violates the spirit of the attainder clause. The defendant as an individual was singled out for prosecution because of political considerations rather than a concern for protecting wider interests of the community.

In Estes v. Texas, supra, the concurring opinion of Warren, C.J. stated at p. 565 that televising criminal trials to the public was a

violation of the 14th Amendment on three grounds, one of them being:

> "(3) that it singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others."

The opinion of the State Supreme Court does not appear to decide the merits of defendant's contention that the pre-trial publicity was so prejudicial as to deny him a fair trial, but rather is based on procedural considerations, i. e. a failure to request a change of venue or continuance.

It is true that the appellant argued only for a dismissal of the charges on his original argument before the State Supreme Court prior to this Court's decision in Sheppard. The appellant's attack was distinguished from that found in the usual pre-trial publicity case by pointing out that the source of the prejudicial pre-trial publicity was the State, itself. This should not prevent the appellant from now contending, as he did on rehearing in the State Supreme Court, that if he is not entitled to a dismissal, he is, at least, entitled to a new trial. The State Supreme Court seems unduly technical in refusing to consider this argument since a motion for a new trial was made to the trial court. A failure to grant a new trial or a dismissal means a three year prison term in the state penitentiary, for a man with no prior criminal record.

This Court, in Sheppard, has announced rules of conduct for law enforcement authorities which make costly their participation in trial by newspaper. Reversal of a conviction where unconstitutional conduct by law enforcement authorities pervaded the proceedings has been used effectively by this Court in other cases as a deterrent to such conduct, e.g, Mapp v. Ohio, 367 U.S. 643 (1961) (evidence obtained by illegal search and seizure); Beck v. Ohio, 379 U.S. 89 (1964) (unlawful arrest); Griffin v. California, 380 U.S. 609 (1965) (comment by prosecutor on failure of defendant to testify); and see Mooney v. Holohan, 294 U.S. 103 (1935); Alcorta v. Texas, 355 U.S. 28 (1957); Napue v. Illinois, 360 U.S. 264 (1959); Brady v. Maryland, 373 U.S. 83 (1963). A presumption of inherent unconstitutionality in a highly publicized trial where law enforcement authorities actively participate in the inflammatory press releases will assist materially in eliminating the practice of "anticipatory trial by newspapers" which currently impairs our administration of criminal justice. Irvin v. Dowd, 366 U.S. 717, 728 (1961) (concurring opinion)

F. A change of venue or a continuance were not effective remedies for the appellant here.

The remedies which are usually suggested to overcome the effects of prejudicial pretrial publicity are continuance and change of venue. These suggested remedies are, of course, at odds with the 6th Amendment to

the United States Constitution. The appellant did not request these remedies, although prior to trial and in motions after verdict he requested a dismissal because of the misconduct of the State.

It is doubtful that a fair trial could be had in any county in Wisconsin under the circumstances of such adverse state-wide publicity.

Appellant's concern for his duty to his businesses and the obvious advantage from this standpoint of a trial in Dane County had to be weighed against the possibility of having a better chance to get a fairer jury in a distant county despite the state-wide nature of the publicity. Under these circumstances, a change of venue was not a practical remedy, for it would have taken the accused away from the business at a time when the business desperately required his presence on a daily basis. The trial here lasted three weeks.

There should be no requirement that a defendant give up his rights under the Sixth Amendment to the Constitution--when the State, itself, is responsible for depriving him of those rights--in order for that defendant to request a new trial on appeal. It is for the appellate tribunal to decide whether the accused has had a fair trial by an impartial judge and jury. If that tribunal decides that there is a great likelihood that the judge or jury were not impartial, then the appellate tribunal should grant either a new trial or a dismissal whether or not the defendant requested a change of venue or continuance.

A failure in the instant case to have a speedy trial meant to the appellant the end of some very substantial business ventures. A request for continuance, if granted, would have meant that the construction and real estate development businesses of the appellant which relied largely on institutional credit, would certainly have ended in out and out bankruptcy. This occurred in the months subsequent to the adverse verdict.

The trial court, in this case, was abundantly aware of the pre-trial publicity. The Court noted:

> "It could very well be that by virtue of the publicity which has taken place that it would be extremely difficult to impanel a jury in Dane County which could be fair and impartial. It is also conceivable that it might be difficult to impanel a fair and impartial jury in a county which adjoins Dane County." (R. 11)

G. Newspaper pressure combined with pressure from Republican politicians to bring about the indictments.

Newspaper pressure for prosecution may have been in part generated through a desire for self protection against libel suits.

At least one Madison newspaper was deeply concerned about the possibility that they may have engaged in libel of the defendants. A newspaper employee testified that the

newspaper's attorney advised him that a demand for retraction of statements concerning possible check kiting had been received and that he called an assistant attorney general to determine how good the evidence of this sort of activity was. He said he wanted to find out ". . .for our own purposes and for purposes of whatever action might ensue from this demand for retraction. . ."

The witness indicated that the Assistant Attorney General said he would be happy to talk to the newspaper's attorney and explain what information he had available to prove the matter.

This is noteworthy, since a formal demand for retraction of the check kiting charge was served on the newspaper and the Director of Securities. The Director issued to the newspapers a release in which he stated that he made no allegations of any kiting of checks. It is not strange, then, to find in the scrapbook, that an editorial from the Wisconsin State Journal for October 12, 1964, has, as its headline, "Time for Action by Torphy". It would be a travesty on justice if newspapers could generate adverse pre-trial publicity and then protect themselves from libel suits by goading prosecutors to prosecute.

The same newspaper employee testified that coverage of this story was almost daily in September and October.

This Court noted in Sheppard: at p. 363

"Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."

The collaboration of an Assistant Attorney General with the newspapers on the libel question seems to violate this announced principle.

H. Actual Prejudice Need Not Be Shown Since The Activities of the A. G. Were Inherently Lacking In Due Process.

Due process cases today are concerned not only with the actual effect of pre-trial publicity, but also the probable effect.

This Court in Sheppard stated:

"Only last term in Estes v. Texas, 381 U. S. 532 (1965), we set aside a conviction despite the absence of any showing of prejudice. We said there:

'It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process' At 542-543.

> "And we cited with approval the language of MR. JUSTICE BLACK for the Court in In re Murchison, 349 U.S. 133, 136 (1955), that 'our present system of law has always endeavored to prevent even the probability of unfairness.'" (Emphasis supplied)

There is a normal reluctance of a juror to concede his bias before his peers. As stated in Irvin v. Dowd, 336 U.S. 717, 728 (1961):

> "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father."

The application of the principle that actual prejudice need not be shown where the circumstances are inherently suspect constitutionally is particularly appropriate in cases involving publicity-poisoned criminal trials. For where such trial contamination is charged, "one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced." Estes v. Texas, 381 U.S. 532 at 544 (1965)

We think it is logical to assume that the A.G.'s comments on this case prior to trial affected the impartiality of the judge as well as the jury. For

> "(t)o deny that bludgeoning or poisonous comment has power to influence or at lease to disturb the task of judging is to

play make believe and to assume that men in gowns are angels. The psychological aspects of this problem become particularly pertinent in the case of elected judges with short tenure." Pennekamp v. Florida, 328 U. S. 331, 359 (1946) (concurring opinion).

As evidence of the possible influence that pre-trial publicity had upon the trial judge, we draw the court's attention to the sentence imposed--three years in the State prison. Even the State Supreme Court commented on this, saying, "The sentence imposed, upon the record we have before us, seems quite severe but that fact does not go to the merits of the conviction." (R. 119)

Further evidence of the possible influence of the pre-trial publicity upon the trial judge is found in the disparity of sentences between appellant and Kelly. Although both were top executives of the company, the court sentenced the Democrat, appellant to three years while the Republican, Kelly, was put on probation. The pre-trial publicity stressed that appellant was a major contributor to Democratic campaigns.

A ruling by this Court that accusatory publicity charging or insinuating guilt is inherently prejudicial and a denial of due process if issued by a principal prosecuting officer would have a salutory effect. It would impress prosecutors with their responsibilities toward the courts, and would warn those

campaigning for political position that cynical abuse of the powers of their office to obtain convictions and to insure election will not be tolerated.

I. The Trial Judge Failed To Adequately Protect The Jury From Prejudicial Outside Influences.

In Sheppard the Court said:

". . . sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. . ."

In the instant case, counsel requested sequestration and the Court planned initially to sequester the jury. It soon became apparent to both the Court and counsel that there would be great difficulty in obtaining jurors for an estimated two week trial if the jury were to be sequestered. Appellant was faced with a dilemna: this time weighing the business necessity of a speedy trial against the prospect of the jury being prejudiced by out of court publicity unless sequestered.

It was reluctantly decided to proceed without sequestration of the jury with the Court admonishing the jury when it left the Court. The concern expressed by counsel on the record concerning adverse publicity should be noted.

The admonishment given jurors by the

trial court is almost identical to that criticized as inadequate in Sheppard. After several repetitions, the admonishments usually tended to be somewhat more cursory.

In Sheppard, the trial judge did not order the jury to assiduously avoid contact with news items concerning the case. In this case, there was likewise no such order. This Court criticized the trial judge in the Sheppard case for not undertaking to protect the jury with the vigor and care for which this responsibility called.

III.

THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT COMMAND THAT A JUDGE NOT DIRECT A VERDICT AS TO ANY MATERIAL ELEMENT OF THE CRIME OF WHICH THE DEFENDANT HAS BEEN ACCUSED.

Section 189.19 (2) (d) of the Wisconsin Statutes, under which appellant was prosecuted, describes as guilty of criminal conduct anyone who

> "file(s) or cause(s) to be filed with the department any statement or representation of a material fact, which statement or representation he knows or in the exercise of reasonable care should know to be false or misleading." (emphasis and parenthetical material supplied)

The trial court said with reference to materiality in its instruction:

> ". . . If you find beyond a reasonable doubt that this balance sheet was submitted by the defendants for the purpose of obtaining permission to issue stock of Allied . . . to the public, then the cash item must be found by you to be material to the question of whether or not permission to issue stock should be given by the . . . Department. . . or to the question of whether or not a prospective purchaser should purchase such stock." (emphasis supplied). (R. 19)

It was at all times admitted that the defendant submitted the balance sheet in question for purposes of obtaining permission to publicly issue stock.

Since the Court told the jury that if the statement was submitted for purposes of issuing stock to the public, the jury must necessarily find the cash item to be material. If they believed the cash item to be false or misleading they necessarily had to find appellant guilty. The jury never passed on the question of its materiality.

Material should have been defined as requested by appellant. (R. 29-31) See Mutual Industrial Bankers, Inc. 1 SEC 268, (1936). Red Bank Oil Co., 25 SEC 334 (1947). This jury never passed on this question, since it was decided for them by the Court's instruction.

Just as the 6th Amendment of the United States Constitution guarantees a trial by jury, which has been interpreted to mean that the jury must pass on all material elements of the crime in U.S. v. Taylor 11 F 470 (1882) and Byrd v. U.S., 342 F (2d) 942 (1965); Article I, Section 7, Wis. Const. guarantees trial by jury, which has similarly been interpreted to require the jury to pass on all material elements of the crime in State v. Evjue, 254 Wis. 581, 37 N.W. (2d) 50 (1949). The 14th Amendment to the United States Constitution bars any state from depriving any person of liberty without due process.

The Court's instruction violated due process by effectively depriving appellant of his constitutional right to trial by jury upon all material elements of the crime.

CONCLUSION

Upon the foregoing statement it is respectfully submitted that the questions presented by this appeal are substantial and are of public importance and that probable jurisdiction should be noted.

IMMELL, HERRO, BUEHNER,
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Attorneys for Appellant.

APPENDIX

52 JUDGMENT SENTENCING DEFENDANT

From all of the evidence in this case, this Court feels that it would not be performing its duty if it didn't say that the Court is satisfied of your guilt; and that the State Director of the Department of Securities was justified in revoking that permit to sell stock. It seems rather fortunate that the Banking Commissioner of Wisconsin saw fit, through bank examiners, to stop what was going on.

You are not an uneducated man, Mr. Woodington. I'm afraid that you felt the gain of a dollar was such that you would accomplish it in almost any manner.

The task which this Court has is not an easy one, but it is the judgment of this Court that you be and you are hereby sentenced to an indeterminate term of not to exceed three years in the State Prison at Waupun. Any application for probation at this time is denied. The Court is going to grant you thirty days from this date as a stay of sentence so that you may place your business affairs in proper order. But thirty days from this date at 10:00 o'clock in the afternoon, you will surrender to the Sheriff of Dane County. You may now be seated.

95 OPINION OF SUPREME COURT OF STATE OF WISCONSIN (Formal Parts Omitted)

APPEAL from a judgment and orders of the Circuit Court for Dane County: RUSSELL E.

HANSON, Circuit Judge, presiding. Affirmed.

The appellant, Neil A. Woodington, was found guilty by a jury of filing a false or misleading financial statement with the Wisconsin Department of Securities in violation of sec. 189.19(2)(d), Stats. Motions after verdict were denied and the appellant was sentenced to an indeterminate term of not more than three years in the state prison.

Neil A. Woodington is a well-known Madison businessman. He was a substantial shareholder and dominant officer in Brooks & Woodington, Inc. (hereafter B & W), which operated a retail lumberyard and fuel oil business. B & W was also a holding company for the stock of several other companies in real estate development, construction, wholesale lumber, and paint and glass. These separate corporations were set up for tax advantages and also to make the best use of the maximum loan limits to single businesses established by banks.

Robert C. Kelly, appellant's co-defendant, was the principal executive officer of Hoard's Creameries, Inc. Under Kelly's direction Hoard's invested $250,000 in 1962 in Allied Development Corporation for which it received one-fourth of the stock. B & W and two subsidiary corporations, West Park Development Corporation and Greentree Estates, Inc., invested $500,000 for which they acquired one-half the stock. Hoard's received an option to invest an additional $250,000 in exchange for the remainder of the stock, and it did so after

the end of the fiscal year 1962-1963 (March 31, 1963). Hoard's later loaned Allied $50,000. Appellant became president and Kelly became executive vice-president of Allied. Both were directors.

Allied was to succeed and liquidate all of the B & W companies. This plan was adopted in response to advice from several bankers. Thus the enterprise would strengthen its credit position and forego tax benefits.

Allied was engaged in wholesale and retail lumber, commercial and residential construction, retail fuel oil, property management, real estate sales, and platting and development of real estate. At any given time it had several million dollars tied up in construction projects and had a monthly cash flow of about $1,000,000.

After the summer of 1963, the board of directors of Allied decided to have a public sale of stock to raise necessary capital. The accounting firm of Virchow, Krause & Co. (hereafter V K & Co.), which had done all prior work for B & W and related companies since their inception in 1953, was hired as Allied's external auditor. The firm drafted a balance sheet which was included in the prospectus submitted to the securities department. V K & Co. had access to all the records and information it desired in reaching the figures included in the balance sheet for March 31, 1964. This statement shows cash at $224,356 and it is that figure which is attacked as false or misleading.

After filing this 1964 audit report, Allied was permitted to sell stock. The authority to sell stock was terminated on September 18, 1964.

In the meantime, Madison American Guarantee Insurance Corporation (hereafter MAGIC), of which appellant and Kelly were officers, had also applied to the securities department for authority to sell stock.

The then attorney general pressed for an investigation of Woodington and Kelly and their conduct regarding MAGIC. The then governor, insurance commissioner, and Dane county district attorney were members of the opposing political party, and Woodington and Kelly had been active members of that party. All of the elected officials were seeking re-election in November.

After some delay an investigation of MAGIC was conducted. It was discovered that MAGIC was so closely associated with Allied that it became necessary to investigate Allied also. The result of this investigation was the discovery of a check kiting scheme involving B & W, Allied, Hoard's and Woodington's personal business account, which while not necessarily illegal, allowed Allied to inflate its cash account for March 31, 1964, the date of the audit report (balance sheet) delivered to the securities department.

On September 18, 1964, the Commissioner of Banks directed all of the banks who held the various accounts not to honor checks drawn on

these accounts unless the deposits had been actually cleared and collected. Over the week-end appellant was able to sell or encumber about $500,000 of Allied's property, the funds from which were used to pay outstanding checks of Allied presented for payment the following Monday and subsequently.

Woodington was president of Allied, president of B & W, vice-president of MAGIC, and an officer of the related corporations. Kelly was chief executive officer of Hoard's, president of MAGIC, vice-president of Allied, and treasurer of B & W.

Appellant and Kelly were charged with filing a false or misleading statement in violation of sec. 189.19 (2)(d), Stats., which provides:

"(2) Every director, officer, agent or employe of any issuer and every dealer, agent, investment advisor or other person shall be imprisoned in the state prison not exceeding 5 years, or in a county jail not exceeding one year, or fined not exceeding $5,000, or both, who shall directly or indirectly:

. . .

(d) File or cause to be filed with the department any statement or representation of a material fact, which statement or representation he knows or in the exercise of reasonable care should know to be false or misleading."

The appellant Woodington and his co-defendant Kelly were tried together. The jury returned verdicts of guilty as to both defendants on July 29, 1955. Judgment was entered on the verdict and defendants sentenced on August 4, 1965. Woodington appeals.

Additional facts will be set forth in the opinion.

BEILFUSS, J. Although the appellant has enumerated 16 assignments of error, they will be categorized into four issues:

1. Were the activities of the state's agents prior to trial such that there was a deprivation of due process requiring dismissal of the charges?

2. Was the evidence sufficient to convict appellant beyond a reasonable doubt?

3. Were the instructions prejudicially erroneous?

4. Is Sec. 189.19 (2)(d), Stats., void for vagueness?

The appellant contends that the conduct of the state's officers, particularly the attorney general, during their investigation of MAGIC, and eventually Allied, deprived appellant of due process of law, for which dismissal is the appropriate remedy.

An investigation into MAGIC began about August 6, 1964, and ended about November 1, 1964. During this period, just prior to the

1964 general election, several state officials exchanged letters and issued press releases.

The import of the attorney general's statements was to the effect that he had received complaints about the operation of MAGIC and that the insurance commissioner had refused or had neglected to co-operate in an investigation of the complaints and had withheld materials and information necessary for the investigation by the attorney general. He also claimed the governor refused to co-operate and condoned the actions of the actions of the insurance commissioner. Further claim was made that the district attorney of Dane county was reluctant to co-operate. Although reference was made by the attorney general to the fact that Woodington and Kelly were members and substantial contributors to the political party of the governor and district attorney, he did not specifically accuse or state that Woodington or Kelly was guilty of any crime. His statement was to the effect that the investigation should proceed forthwith so that their guilt or innocence could be established.

Woodington and Kelly also participated in the publicity by issuing news releases and by purchasing full-page newspaper space for their statements.

The charges, countercharges and explanations did receive publicity and comment in the press, radio and television.

The appellant does not rely upon the content

of the publicity to support his argument for dismissal. He states in his brief, "Our focus is solely upon the source, i.e., agents of the state, and particularly the Attorney General."

Further, the appellant does not categorically claim he did not receive a fair trial but rather the pre-trial publicity was such that it is not certain he did receive a fair trial or that he could have received a fair trial in any area in the state and was thus denied due process under the Fourteenth Amendment of the United States Constitution.

Appellant moved for dismissal before trial. The motion was denied. No motion for change of venue or continuance was made, even though the trial court virtually invited such motions. Appellant did not move for a new trial on this ground and does not now ask for a new trial based upon prejudicial pre-trial publicity. He asserts the only adequate remedy is a dismissal of the charges.

It is significant that appellant did not make a record of the voir dire examination, apparently had no trouble in drawing a jury, and has nowhere alleged that the particular jury selected was in any way prejudiced or unfair. It is fundamental that appellant must show that he did not receive a fair trial before he can get to the question of whether or not a fair trial could ever be obtained.

Sec. 14.546 (1), Stats., provides:

"There is created within the office of the attorney general the division of criminal investigation for the purpose of investigating crime which is statewide in nature, importance or influence."

It is thus apparent that the attorney general has a legitimate interest in investigating complaints of criminal conduct if, in his opinion, the investigation is warranted.

A perusal of the various due process cases indicates that the law is concerned with the actual effect ill-advised pre-trial publicity produced at the trial.

In Delaney v. United States (1st Cir. 1952), 199 Fed. (2d) 107, the defendant, who was collector of internal revenue for the district of Massachusetts, was charged with violations consisting of taking money to influence decisions before him. He was suspended, removed, indicted, and arraigned with the expected publicity in the Boston newspapers. At the time of these occurrences there was a congressional committee on administration of internal revenue laws conducting investigations. This committee sent word that it intended to proceed promptly with its public hearings. Delaney protested because his trial had not occurred, and the only possible result of public hearings would be to adversely prejudice the community against him. A member of the Justice Department appeared before the committee to urge that matters before it not be publicly disclosed, but the committee proceeded with its public hearings over

additional Justice Department entreaties.

The committee conducted public hearings in Boston which were extensively reported in the newspapers. The hearings resumed in Washington where they focused on Delaney. Boston papers sent feature writers to cover the events. Many witnesses before the committee had testified before the federal grand jury in the Delaney Case. Delaney was not subpoenaed or invited to the hearings. No cross-examination was allowed. The evidence went far beyond that relevant to the charges against Delaney and concerned his private, personal affairs, and other possible criminal conduct. At the close of the hearings the committee chairman commented publicly on the hearings.

The court stated:

> "Since the committee evidently felt that there were overriding considerations of public interest which demanded that its open hearings proceed, it must be inferred that the committee intended, as indeed it must have foreseen, that its proceedings would receive the most widespread publicity. The record sets forth this resulting publicity in overhwelming detail." Id. page 111.

Delaney filed a motion to dismiss and a motion for continuance. Both motions were denied. The Court of Appeals stated:

> "As to the motion to dismiss the indictments . . . we see no reversible error in the denial of this motion. The

damaging publicity resulting from the King Committee hearings took place after the indictments had been handed down, and cannot be supposed to have infected the deliberations of the grand jury. Nor could it be said, in this case, if indeed it could be said in any case, as a matter of law, that the prejudicial effect of this publicity was so permanent, and ineradicable by mere lapse of time, that the court should have recognized the impossibility of a fair trial ever being held at any time within the foreseeable future." Id. pages 111, 112.

The court went on to recognize that this was a unique case in the sense that the publicity was not initiated by newspapers or private persons, but by the United States itself. The court determined that:

"If all this material had been fed to the press by the prosecuting officials of the Department of Justice, we think that an appellate court would have had to say that the denial of a longer continuance was an abuse of discretion." Id. page 113.

"We think that the United States is put to a choice in this matter: If the United States, through its legislative department, acting conscientiously pursuant to its conception of the public interest, chooses to hold a public hearing inevitably resulting in such damaging publicity prejudicial to a person awaiting trial on a pending indictment, then the United States must

accept the consequence that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed." Id. page 114.

Nowhere in this case, although the issue was directly before it, did the court suggest the possibility that dismissal would be appropriate. The court did, however, reverse as to the denial of the continuance.

Commonwealth v. Geagan (1959), 339 Mass. 487, 159 N.E. (2d) 870, certiorari denied 1959, 361 U.S. 895, was the case concerning the great Brinks robbery in Boston in 1950. Defendants there moved to quash the indictments because they could never receive a fair and speedy trial. The motion was based on press releases and statements of state and federal law enforcement authorities which received emphasis in the newspapers.

The court labeled any publicity created by public officials as indefensible, but it did not dismiss.

"If there was publicity created by enforcement officials, this was indefensible. It does not follow, however, that the inevitable result is that the defendants must be released, because they can never constitutionally be tried. . . , or that these

particular indictments should be quashed." Id. page 501. See also United States v. Medlin (6th Cir. 1965), 353 Fed. (2d) 789.

The remedies in publicity cases are change of venue, continuance, and careful selection of a jury.

The several cases considering state or federal initiated publicity, as the case may be, do not support appellant's contentions, nor has he cited any which do. He suggests that a fair trial could never have been had under the circumstances. The cases dispute such a contention.

Alternatively, he urges that public policy requires dismissal as the only adequate remedy to curb the undesirable conduct of prosecutors and state officials.

For the courts to interfere with the attorney general's duty to investigate and prosecute crime and make public material he deems in the public interest could be an unwarranted interference with the balance of power. This is pointed out in Delaney as to the legislative branch, and is said to apply to the executive branch as well.

The attorney general is a high constitutional executive officer. He is an important law enforcement officer of the state. In a broad sense he is the attorney for our body politic. He should be allowed sufficient latitude to inform the public as to his activities in matters of great public concern. This right, however, should be exercised with circumspection so as not to

prejudice or impair the rights of a defendant in either prospective or pending litigation.

The attorney general is not on trial in this matter. If his conduct overstepped the bounds of his legal ethical obligations (we do not characterize his actions as such), proper inquiry could be made by the integrated bar disciplinary procedures under Canon 20 of the "Canons of Professional Ethics."[1]

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[1] American Bar Association (1957), Opinions of Committee on Professional Ethics and Grievances, Opinion 199, pp. 400, 401, concerning Canon 20, states:

> "The Attorney General is the executive head of the Department of Justice of the United States. 5 U.S.C.A. § 291. He and his subordinates are the legal representatives of the United States in all proceedings, both civil and criminal, in the courts of the United States in which the United States is a party or has an interest. 5 U.S.C.A. §§ 309, 310, 315, 316. In a broad aspect the Attorney General is attorney for the body politic. Therefore, in publishing his reports and in issuing public statements for dissemination through ordinary news channels, he is reporting to the public. Herein lies a material difference between a report or a press release issued by the Attorney General and one given out by an attorney for a private client. Notwithstanding this difference, certain limitations should be regarded in giving out press releases by the Attorney General respecting pending or prospective litigation in order that the rights of the defendants, both in criminal and civil prosecutions, be neither impaired nor prejudiced."

More significant in this case is that appellant did not move for a change of venue although the trial court virtually invited such a motion. He did not move for a continuance. He has not made a record of the voir dire examination.[2] He has not moved for a new trial because of adverse publicity. He has not in any way alleged or shown that the trial he received was unfair. He only asserts that the events prior to trial have created an uncertainty concerning the fairness of the trial. Such an assertion may not be sufficient to justify either a continuance or change of venue, much less dismissal.[2a]

Frank v. Mangum (1915), 237 U.S. 309, 35 Sup. Ct. 582, 59 L. Ed. 969, was a case involving an alleged denial of due process because of public sentiment against defendant. On habeas corpus defendant asked for dismissal because the trial was dominated by mob rule. The supreme court stated:

> "We are very far from intimating that manifestations of public sentiment, or any other form of disorder, calculated to influence the court or jury, are matters to be lightly treated. The decisions of the

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[2] We are cognizant of the fact that usually a record is not made of the voir dire examinations. However, in this instance the appellant was well aware of his claim that an impartial jury could not be obtained by virtue of his own pre-trial motion to dismiss on that ground. Under these circumstances we deem he should have made a record of all or a part of the voir dire to preserve his claim.

[2a] See sec. 956.03 (3), Stats.

Georgia courts in this and other cases show that such disorder is repressed, where practicable, by the direct intervention of the trial court and the officers under its command; and that other means familiar to the common-law practice, such as postponing the trial, changing the venue, and granting a new trial, are liberally resorted to in order to protect persons accused of crime in the right to a fair trial by an impartial jury. The argument for appellant amounts to saying that this is not enough; that by force of the 'due process of law' provision of the Fourteenth Amendment, when the first attempt at a fair trial is rendered abortive through outside interference, the State, instead of allowing a new trial under better auspices, must abandon jurisdiction over the accused and refrain from further inquiry into the question of his guilt.

"To establish this doctrine would, in a very practical sense, impair the power of the States to repress and punish crime; for it would render their courts powerless to act in opposition to lawless public sentiment. The argument is not only unsound in principle but is in conflict with the practice that prevails in all of the States, so far as we are aware." Id. pages 336, 337.

The above is not a state-initiated publicity case, but it does reflect the public policy factors equally at play in such cases.

Upon the record before us we must reject the contention that the action against the appellant should be dismissed because of the alleged prejudicial pre-trial public statements of the attorney general.

Appellant has argued that there was no evidence (1) that he filed the statement "knowing" it would deceive the protected class of persons; and that the evidence was insufficient to show (2) that he should have known the statement to be false or misleading, (3) that he "knew" cash to be false or misleading, (4) that cash was false, and (5) that cash was misleading.

What had been occurring for some time was a check exchange procedure in which Hoard's would write a check to Allied and Allied would write one back to Hoard's on the same day or a day later. Such a transaction would not affect Allied's or Hoard's books except to the extent that the amounts varied or the checks were written or received on different days. However, so far as the banks were concerned, the effect was to inflate Allied's cash in its bank account. This resulted because Hoard's checks which were written on the First National Bank of Fort Atkinson were treated as collected funds by Allied's bank, American Exchange Bank in Madison. Collected funds are funds which have been paid by the payor bank as a result of the clearing process. This takes two or three days between Fort Atkinson and Madison. On occasion Hoard's would hold the Allied check for several days before depositing it in the First National Bank.

The effect was to give Allied a bank loan for several days. Its bank balance would be positive, but it would have checks outstanding which would substantially reduce or negate the cash balance shown on the bank's books. The amount needed to cover the checks outstanding would come from subsequent check exchanges. However, there was never enough money available in the several accounts to pay all outstanding checks if one could stop the clock, so to speak, and add up the bank balance and outstanding checks. This is, in effect, an overdraft.

To further complicate this situation, B & W had an account at the American Exchange Bank which occasionally became involved. Since this account was in the same bank as Allied's general account, there would be no advantage as a result of the clearing process. However, Woodington maintained a personal account in the Commercial State Bank in Madison which was used by appellant, B & W, and Allied as needed. It was always kept in a collected condition so that certified and cashier's checks necessary for real estate closings could be drawn. This account (hereafter NAW) was used to make a triangular check exchange on occasion. The exhibits (57-60) graphically illustrate the procedure used, which is a form of check kiting.

There are innumerable definitions of check kiting but the accountants who testified all agreed that it involves a transfer of funds between two or more banks to obtain unauthorized credit from the bank during the time it takes the checks to clear.

There is some question concerning whether a kiting operation actually occurred because there was testimony that the banks knew what was occurring and agreed to it. In any event, that is not the issue. Kiting is not per se illegal. It may be poor banking practice and a concern for the commissioner of banking, but it is not a crime and is not the substance of the crime charged. The information alleges the appellant filed a false or misleading report with the Department of Securities.

On March 31, 1964, Allied showed in its balance sheet cash at $224,356. This figure was arrived at by adding deposits in transit to the bank balance and subtracting checks outstanding. Deposits in transit totaled $276,221.

An examination of the deposits in transit reveals two checks on NAW to Allied totaling $25,000 dated April 1, 1964, and one check on B & W dated April 1, 1964, for $19,500. The accountants all testified that these cannot be included as cash on March 31st because dated April 1st, and because the NAW and B & W accounts were overdrawn a minimum of $47,552 and $353,592 respectively. One must look behind from subsidiary or related companies to see that there are funds available to pay them before including them as cash. Deposits in transit also included a check for $50,000 drawn on NAW and a check for $98,500 drawn on B & W, both accounts being closely related to Allied and in a substantial overdraft position. The exhibits illustrate that even if the checks dated April 1st had been dated March 31st both accounts would still have been in an overdraft status.

There was also a factor's lien transaction on March 31st with Industrial Credit whereby Allied received $100,000. The check was dated April 1, 1964, but it was included as cash on March 31st. After subtracting the six checks included above, the balance is an overdraft of $43,643. However, the accountants deemed it proper to deduct an additional $100,000 which was the portion of the cash balance created by the exchange of checks with Hoard's.

Where there was check kiting, whether the outstanding checks were paid, whether investors were damaged, and similar questions are all irrelevant. The only issue is violation of the statute, sec. 189.19 (2) (d), which follows:

> "(2) Every director, officer, agent or employe of any issuer and every dealer, agent, investment advisor or other person shall be imprisoned in the state prison not exceeding 5 years, or in a county jail not exceeding one year, or fined not exceeding $5,000, or both, who shall directly or indirectly:
>
> ". . .
>
> "(d) File or cause to be filed with the department any statement or representation of a material fact, which statement or representation he knows or in the exercise of reasonable care should know to be false or misleading."

Appellant contends that a double meaning must be given to the word "know" in the statute. He argues that the state must prove that he believed the statement false or misleading and that he filed it for the purpose of deceiving investors. The language of the statute clearly negates this argument. Not only does it specifically condemn the filing of a false statement, but it also encompasses filing a statement which the filer should know to be false or misleading. Intent to deceive is not an element of a negligent filing of a false report. Neither does the statute require intent to deceive in the intentional filing of a false report.

The test on appeal of sufficiency of the evidence is whether the '''''evidence adduced, believed, and rationally considered by the jury, was sufficient to prove defendant's guilt beyond a reasonable doubt. ''''' State v. Waters (1965), 28 Wis. (2d) 148, 153, 135 N.W. (2d) 768, quoting from State v. Stevens (1965), 26 Wis. (2d) 451, 463, 132 N.W. (2d) 502; Lock v. State (1966), 000 Wis. (2d) 000, 000 N.W. (2d) 000.

Appellant's argument here is that the size and complexity of Allied's operations made it necessary to delegate duties and to rely on statements of others.

When dealing with a duty of reasonable care, we are dealing with the exercise of reasonable care under the circumstances. This is what the trial court instructed. Thus, the actual duty imposed will vary depending upon the size and formal structure of the business - whether a small sole proprietorship or a large

corporation - and upon other factors. It was for the jury to determine whether under the circumstances of this case appellant should have known the statement was false or misleading.

There is no question that appellant initiated the check exchange scheme. There was no question but that he knew that such a scheme would create an artificial bank balance. He is an attorney at law. He was a very distinguished student. He helped organize and was dominant in several corporations related to Allied from 1953 to 1964. Significantly, he had done the same thing in 1961 until advised to stop the practice by the commissioner of banking. He engaged in check kiting when Allied needed working capital and intended it to continue only until funds were raised by stock sales. He knew the financial condition of Allied better than anyone but the internal accountant. Most important is the fact that appellant constantly was aware of the cash needs and shortages of Allied. He found it necessary to make increasing demands upon Hoard's for more frequent check exchanges. There is overwhelming evidence that appellant was keenly aware of the overdraft status of Allied's account.

There is ample credible evidence from which the jury could conclude that appellant knew or should have known cash to be false or misleading. He admitted thinking it to be a little high when he first saw the balance sheet.

The statute is violated if the credible evidence shows, under the requisite burden of

proof, that either of the following occurred: (a) appellant should have known cash to be misleading, (b) appellant should have known cash to be false, (c) appellant knew cash to be misleading, or (d) appellant knew cash to be false. It is unnecessary to consider any but the easiest to prove, since only one count was charged and only one verdict submitted to the jury.

The facts just stated above relate to the appellant's knowledge. It is also interesting to note exhibit 43. This exhibit shows that Allied had substantial overdrafts on March 25th through March 30th, and again on April 2nd through April 6th. Only on the crucial date, March 31st, and the following date did Allied have a positive book balance.

Exhibit 44 shows that from January 31, 1963, through September 30, 1964 (21 months), on only three month ends did Allied's general account have a positive book balance. One of these was March 31, 1964. Only on that one date was the total of all Allied's accounts a positive one.

Exhibit 53 shows the checks issued by B & W and Allied to Hoard's from January 1, 1964, to April 30, 1964. B & W issued three checks to Hoard's on January 6, 1964. After that Allied issued all checks back to Hoard's except $175,000 worth issued by B & W March 26th, 30th, and 31st. B & W again issued some checks at the end of April. It is significant that Allied did not drain its account in the last few days of March but that B & W repaid Hoard's. This allowed Allied's general account to increase

by the amount of $175,000 from the Hoard's checks deposited in that account.

Finally, exhibits 54 and 55 show the net effect of the transactions between the several accounts in March and April. In March, Allied received $422,138 more from Hoard's, B & W, and NAW than it paid out, but in April it paid out $193,091 more than it received.

On the basis of the testimony and the exhibits the jury could conclude that there was a very carefully contrived scheme to inflate Allied's account for the crucial March 31st date. Appellant signed all checks of B & W and NAW.

The accountants all testified that cash was false and misleading. This was because the two B & W checks ($118,000) should not have been considered cash since the B & W account was related to Allied and was in an overdraft position and because one check was dated April 1st; because the three NAW checks ($50,000) were written on an overdrawn related account and because two were dated April 1st; and because the Industrial Credit check ($100,000) was dated April 1st. All of which resulted in the inflation of Allied's cash account.

Only appellant's assertions stand against this evidence. It is irrelevant that Allied had assets which could have been encumbered or converted into cash. The investor has a right to accurate information which he may rely on completely or ignore, as he pleases.

Checks are not cashed on March 31st when dated April 1st. That the checks were paid at a later date does not change the fact.

As Professor Blakely testified, Allied had a perfect right to end its fiscal year on any date it chose. That is a business decision. Once that decision is made, however, the company must present a true picture of its financial status as of that date.

An investor might look at the balance sheet Allied presented and one with the items complained about listed as receivables due, or due the next day, and conclude that that would make no difference to him. Another investor might see a negative cash account and refuse to consider investing in such a venture. These are investment decisions to be made by the investor free from false or misleading information furnished by the officers of the corporation.

We are of the opinion that the evidence amply supports a finding that the appellant violated the statute.

Appellant attacks the instructions of the court to the jury on (1) materiality, (2) false, (3) misleading, (4) knowledge, (5) exercise of ordinary care, (6) conspiracy, and (7) also the form of the verdict.

Appellant states that the purpose of the Blue Sky Laws is to protect the investment-buying public. Thus, the materiality instruction should have been in terms of whether the cash item was important to a potential investor.

The statute requires the false or misleading representation to be of a material fact.

In the instruction given, the court stated:

> "If you find, beyond a reasonable doubt, that this balance sheet was submitted by the defendants for the purpose of obtaining permission to issue stock of Allied Development Corporation to the public, then the cash item must be found by you to be material to the question of whether or not permission to issue stock should be given by the Wisconsin Department of Securities, or to the question of whether or not a prospective purchaser should purchase such stock."

Appellant argues that this amounted to a directed verdict on one element of the crime. The state argues that materiality is always for the court.

Without regard to whether materiality is for judge or jury, it can be said in this case that the court did not commit prejudicial error because additional instructions on materiality clarified the portion defendant complains about.

> "In order for the statement to be material, it must have some weight and reference to the determination of either of those two questions (permission to issue and prospective purchase). If the cash item on the balance sheet was relevant to the question of whether or not the Department of Securities would allow Allied

Development Corporation to issue public stock, then it is a material statement. If the cash item was relevant to the issue of whether or not a purchaser would purchase such stock, then it is a material statement.

"The test of materiality is whether a false or misleading statement could influence the Wisconsin Department of Securities or a prospective purchaser, not whether it does in fact do so. The degree of materiality is unimportant."

The instruction taken as a whole is not an erroneous statement of the law and the ultimate determination of whether the cash item in the balance sheet was material was left to the jury.

The court's instruction defining "false" is criticized as not relating to the overall profitability of the business as it appears to a reasonably prudent investor.

The instruction given was:

"False means 'not true, erroneous, incorrect'. A written statement is made false not only by reason of what it stated, but also by reason of what it omitted to state, or what is concealed or implied."

The appellant's argument goes to materiality not falsity. We deem the instruction an accurate definition of "false" and not erroneous.

The instruction as to "misleading", as set forth by the appellant, is as follows:

"Therefore, you must find, beyond a reasonable doubt, that the cash item on the balance sheet is misleading to either the Wisconsin Department of Securities or to any prospective purchaser of Allied Development Corporation stock. It need not be misleading to both groups of persons."

We find nothing erroneous in this instruction.

The court instructed the jury as to "knowledge":

"If you find, beyond a reasonable doubt, that either defendant, or both defendants, were actively engaged in the management and domination of the affairs of Allied Development Corporation, then either or both of them, as you so find, are chargeable with knowledge of its financial condition."

This instruction is not a directed verdict on knowledge that the statement was false, as appellant contends. There were separate specific instructions on knowledge that the cash item was false. This instruction is on the general financial condition of Allied. The jury had to determine that appellant was familiar with the overall financial condition of Allied before it could determine whether or not he should have known cash to be false or misleading. The instruction was related to the other negligence instructions and was correct.

The court had instructed immediately prior to this instruction, --

> "Knowledge may be inferred where the lack of knowledge consists of ignorance of facts which any ordinary person under similar circumstances should have known."

This was the context of the instruction, and in that context it was correct.

A broader statement was labeled "perhaps too broad" in Hobbins v. State (1934), 214 Wis. 496, 516, 253 N.W. 570, but was not termed erroneous.

The statement of the law as instructed here was accepted in Matter of Filardo (1936), 221 Wis. 589, 603, 267 N.W. 312 and Schroeder v. State (1933), 210 Wis. 366, 375, 244 N.W. 599, 250 N.W. 185, certiorari denied 289 U.S. 757.

The statute (sec. 189.19 (2) (d)) provides: ".... which statement or representation he knows or in the exercise of reasonable care should know to be false or misleading."

The appellant argues that the court should have instructed that appellant should not be held to the standard of care of a certified public accountant.

The instructions on negligence were typical of those given and approved by this court. Wis J I--Criminal 375. They included the following statement:

"Negligence may also be said to mean a want of, or failure to exercise, that care and caution which a person of ordinary intelligence and prudence usually exercises in a like or similar situation, work or operation, under like or similar circumstances.

This is not an erroneous statement and does not hold the appellant to the knowledge and standards of a certified public accountant.

The appellant quotes an excerpt of the instruction on parties to a crime as defined by sec. 939.05, Stats. The entire instruction as given is taken from Wis J I--Criminal 400 and defines the alternatives encompassed in the statutory definition of parties to a crime. We deem the entire instruction as given is not an erroneous statement of the law and was not prejudicial to the defendant under the facts of the case. The reference to any other crime is superfluous but not prejudicial.

The instructions criticized by the appellant are, in the main, portions taken out of context. We have carefully considered all of the instructions given to the jury by the trial court and conclude that, taken as a whole, they are not erroneous nor prejudicially unfair to the appellant. [3]

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[3] Willenkamp v. Keeshin Transport System, Inc. (1964), 23 Wis. (2d) 523, 127 N.W. (2d) 804; Field v. Vinograd (1960), 10 Wis. (2d) 500, 103 N.W. (2d) 671; Brunner v. Van Hoof (1958), 4 Wis. (2d) 459, 90 N.W. (2d) 551; Bobrowski v. Henne (1955), 270 Wis. 173, 70 N.W. (2d) 666; Kuklinski v. Dibelius (1954), 267 Wis. 378, 66 N.W. (2d) 169.

The appellant also contends that the form of the verdict was erroneous. The form providing for a finding of guilty was as follows:

> "We, the Jury, find the Defendant, Neil A. Woodington, guilty of filing a false or misleading statement as charged in the Information."

The jury was instructed that the verdict returned must be unanimous.

The appellant argues that the jury could have returned a verdict upon four possible theories: (1) knowingly filing a false statement, (2) knowingly filing a misleading statement, (3) negligently filing a false statement, and (4) negligently filing a misleading statement; and that it is possible that all twelve jurors did not agree upon any one theory.

The appellant was charged with but one count in the information -- a violation of sec. 189.19 (2) (d), Stats.

The statute provides for the penalty if the defendant did, "File or cause to be filed with the department any statement or representation of a material fact, which statement or representation he knows or in the exercise of reasonable care should know to be false or misleading."

We are of the opinion that the proof in the record amply supports the verdict under all of the propositions or theories set forth by the appellant. The statute condemns the conduct when the defendant "knows" or the lesser

standard of "in the exercise of reasonable care should know." If one or more of the jurors were convinced beyond a reasonable doubt that the defendant in the exercise of reasonable care should have known, and the balance of the jurors were convinced by the same degree of proof he did actually know, the defendant cannot complain. If a juror was convinced the appellant knew, his verdict is not inconsistent with his fellow juror who was convinced that in the exercise of reasonable care he should have known.

The words "false" and "misleading" within the context of the statute are both designed to prevent deception. While the words "false" and "misleading" taken out of context and examined separately might have slightly different meanings, we believe that they should be read together so as to encompass the prohibited act of deception. In any event, the testimony of all three accountants who testified stated the cash was both false and misleading.

The statute contemplates but one crime -- deception in the issuance of corporate stock to the public. It was not error to submit the verdict in the form used by the trial court.[4]

The appellant asserts that sec. 189.12 (2) (d), Stats., should be declared unconstitutional and void because of the vagueness of its provisions. He particularly attacks the portions of the statute that permit a conviction for a want of reasonable care and the filing of a material

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[4] See Hobbins v. State, supra, pp. 514, 515, and cases cited therein.

statement that is misleading. The statute, again, is as follows:

> "(d) File or cause to be filed with the department any statement or representation of a material fact, which statement or representation he knows or in the exercise of reasonable care should know to be false or misleading."

We approach the problem faced with "the strong presumption of constitutionality of the statute," [5] and with the acknowledgment:

> "These statutes are part of ch. 189, Stats., the Wisconsin Securities Law, the purpose of which is to protect the public by preventing the sale of worthless and fraudulent securities. Klatt v. Columbia Casualty Co. (1933), 213 Wis. 12, 250 N.W. 825; State v. Rogers (1937), 226 Wis. 39, 275 N.W. 910. The several sections must therefore be considered in the light of that fundamental purpose." State v. Eisbach (1953), 263 Wis. 554, 556, 557, 57 N.W. (2d) 725.

The appellant, through counsel, argues the question of void for vagueness at length and from several concepts. Without discussing the various details presented, we deem the controlling issue to be -- Is the statute read as a whole

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[5] State v. Kerndt (1956), 274 Wis. 113, 79 N.W. (2) 113; United States v. National Dairy Corp. (1963), 372 U.S. 29, 83 Sup. Ct. 594, 9 L. Ed. 561.

so indefinite and vague that an ordinary person could not be cognizant of and alerted to the type of conduct, either active or passive, that is prohibited by the statute?

> "It has often been held that a criminal statute must be definite enough to inform those who are subject to it as to what acts will render them liable to its penalties. Lanzetta v. New Jersey (1939), 306 U.S. 451, 453, 59 Sup. Ct. 618, 83 L. Ed. 888; Connally v. General Construction Co. (1926), 269 U.S. 385, 391, 46 Sup. Ct. 126, 70 L. Ed. 322. See Unconstitutional Uncertainty--An Appraisal, 40 Cornell Law Quarterly (1955), 195, 196." State v. Givens (1965), 28 Wis. (2d) 109, 115, 135 N.W. (2d) 780.

The state, through the legislature, in the proper exercise of its police power, sought to regulate the sale of corporate securities so that the public will not be economically victimized by false or misleading information. The fact that the record may not contain sufficient proof to show that any person was deceived or misled is not controlling. We are not, at this stage, concerned with the sufficiency of the proof but rather the validity of the statute.

In keeping with this purpose the legislature has required that before securities of a corporation can be offered for sale to the public generally (except exemptions not material here) such securities must be registered by the Department of Securities under the conditions and safeguards set forth in ch. 189, Stats.

We have no hesitancy in concluding that no average person seeking registration of securities for the purpose of sale to the public could be unaware or confused as to the prohibitions of sec. 189.19 (2) (d), Stats. The statute, with ample clarity, advised him that he cannot seek registration nor offer securities for sale if he in fact knows of the falsity or misleading nature of a material statement or representation in connection therewith. The statute advises him with equal clarity that he is obligated to use ordinary care to determine the falsity or misleading character of material statements or representations. Because of the legislative concern for the welfare of the public, the burden imposed -- to exercise ordinary care -- is neither ambiguous, uncertain, nor unfair. Where the substantial protection of the public welfare is concerned the legislature can, in the proper exercise of the police power, constitutionally prohibit, by criminal statute, negligent conduct which would be detrimental to this public interest.

Whether the material statement be false or misleading, the legislative purpose is clear -- no one shall either knowingly or negligently deceive the department or the public. No average person can be heard to say that he does not so understand the language of the statute.

The appellant's attack on the statute is more that he should not have been found guilty under the statute rather than that the statute is too indefinite to be fair. He is really arguing burden of proof more than unconstitutionality.

Both the appellant and the respondent have cited a multitude of cases. To discuss them would only prolong an already lengthy opinion.

Authoritative relevant cases that uphold statutes challenged as "void for vagueness" are Commonwealth v. Reilly (1924), 248 Mass. 1, 142 N.E. 915; United States v. Gambling Devices (1953), 346 U.S. 441, 74 Sup. Ct. 190, 98 L. Ed. 179; United States v. Cardiff (1952), 344 U.S. 174, 73 Sup. Ct. 189, 97 L. Ed. 200; United States v. Spector (1952), 343 U.S. 169, 72 Sup. Ct. 591, 96 L. Ed. 863; Boyce Motor Lines, Inc. v. United States (1952), 342 U.S. 337, 72 Sup. Ct. 329, 96 L. Ed. 367; Jordan v. De George (1951), 341 U.S. 223, 71 Sup. Ct. 703, 95 L. Ed. 886; United States v. Ragen (1942), 314 U.S. 513, 62 Sup. Ct. 374, 86 L. Ed. 383; Winters v. New York (1948), 333 U.S. 507, 68 Sup. Ct. 665, 92 L. Ed. 840.

Because of the nature of the crime for which the appellant stands convicted, the sentence imposed, and other apparent ramifications of the case, we have reviewed the entire voluminous record, briefs, and argument of counsel for both the appellant and the state in detail and with care. The appellant is in his own right a learned attorney. He was represented by highly competent counsel who have pursued most diligently and thoroughly his defense at trial and review in this court. We conclude that he did have a fair trial and that credible evidence in the record amply supports the jury's verdict of guilty under a constitutional statute. The sentence imposed, upon the

record before us, seems quite severe but that fact does not go to the merits of the conviction.

By the Court. - Judgment and orders affirmed.

155 DECISION OF SUPREME COURT OF STATE OF WISCONSIN ON APPELLANT'S MOTION FOR REHEARING.
(Formal parts omitted)

PER CURIAM. Appellant argues, on motion for rehearing, that he is entitled to a new trial because of the probability that the jury was influenced by the pretrial publicity initiated by the attorney general and others and discussed in the opinion.

On the appeal, appellant sought dismissal on the ground that it is obvious that a repetition of this behavior /by agents of the state/ can be deterred only if its consequence is a total denial of prosecution" and "In effect and in spirit, albeit nor formally, the State's conduct adds up to an executive 'Bill of Attainder'."[1] He said:

"Appellant is not relying upon a prejudicial pretrial publicity rationale, such as that urges /sic/ in State v. Nutley, 24 Wis. (2d) 527, 129 NW (2d) 155 (1964); Irvin v. Dowd, 366 US. 717 (1961); Rideau v. La., 373 U.S. 723 (1963). In those cases,

[1]Appellant's Brief, p. 28.

> the courts were concerned with the impact of the content of certain pre-trial publicity upon the ultimate trier of fact. The focus was solely upon the content of the material rather than its source. Our focus is solely upon the source, i.e., agents of the state, and particularly the Attorney General..."[2]

He failed to ask the trial court for change of venue or continuance, or for a new trial on the specific ground of prejudicial pretrial publicity. [3]

He failed to include a transcript of the voir dire examination of prospective jurors in the record on appeal, although he now tells us a record was made and transcribed, that he has furnished it to our clerk, and that it shows that only three of the prospective jurors "indicated that they were not aware of the pre-trial publicity." [4]

We consider that appellant, in presenting his appeal, argued only, on this aspect of the

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[2] Appellant's Brief, pp 22-23

[3] He did close his motion after verdict with a request for a new trial in the interest of justice "for all these reasons cumulatively." Although the quoted phrase can possibly be read as including, among many others, the complaint about the pretrial conduct of the prosecution upon which a motion for dismissal had been grounded, we do not view it as a sufficient specification on this as a ground for a new trial.

[4] Appellant's Brief in support of rehearing, p. 23.

case, that because the pretrial publicity instigated by the state's agents might tend to deprive him of a fair trial, the case should be dismissed in order to discipline the state's agents, but chose not to attempt to convince us of the fact nor the probability that such publicity did influence the jury, so as to entitle him to a new trial.

Appellant calls our attention to Sheppard v. Maxwell, decided June 6, 1966, ___U.S.___, and points out that it was decided only one day before this case. We see nothing in Sheppard which should impel us to review on rehearing a claim in which appellant had so little confidence that he failed to move for continuance or change of venue, failed to move for a new trial on such ground, failed to include a transcript of the voir dire in the record, and failed to argue at the appropriate time.

We decline to review this claim which has been raised for the first time on motion for rehearing.

The motion for rehearing is DENIED.

Appellant filed a separate motion, seeking review and modification of the sentence imposed. In essence this is also a motion for rehearing, but upon a ground not even hinted at in the briefs on appeal. We did say in the opinion that the sentence "seems quite severe," but by no means went so far as to characterize this as one of the "rare" cases where "an abuse of discretion clearly appears" so as to overcome

our "strong policy against interference with the discretion of the trial court in passing sentence..." [5]

This motion is also DENIED.

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[5] State v. Tuttle (1963), 21 Wis. (2d) 147, 150, 124 N.W. (2d) 9.

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SUPREME COURT, U. S.

FILED
DEC 23 1966

In The

SUPREME COURT of the UNITED STATES

October Term, 1966

No. 801

NEIL A. WOODINGTON,

Appellant-Petitioner,

vs.

STATE OF WISCONSIN,

Appellee-Respondent.

MOTION OF APPELLEE TO DISMISS APPEAL
BRIEF IN SUPPORT OF MOTION
BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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In The

SUPREME COURT of the UNITED STATES

October Term, 1966

No. 801

NEIL A. WOODINGTON,

Appellant-Petitioner,

vs.

STATE OF WISCONSIN,

Appellee-Respondent.

MOTION OF APPELLEE TO DISMISS APPEAL
BRIEF IN SUPPORT OF MOTION
BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

MOTION OF APPELLEE TO DISMISS APPEAL

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal from the final judgment of the Supreme Court of Wisconsin in the above action, *State v. Woodington*, 31 Wis. 2d 151, 182a, 142 N. W. 2d 810, 143 N. W. 2d 753 (1966), on the ground that the appeal does not present a substantial federal question.

OPINIONS BELOW

The decision of the Dane County Circuit Court (the trial court) denying Appellant's motion to dismiss the information (R. 3-18) is unreported and is printed in Appendix B hereto, *infra*, pp. 106-121. The opinion of the Wisconsin Supreme Court is reported at 31 Wis. 2d 151, 142 N. W. 2d 810 and the per curiam opinion of the Wisconsin Supreme Court denying Appellant's motion for rehearing is reported at 31 Wis. 2d 182a, 143 N. W. 2d 753.

JURISDICTION

Inasmuch as only one of the questions raised by Appellant is appealable, his Jurisdictional Statement contains the statutory requisites for both appeal and petition for certiorari. As to those questions for which the proper mode of review is by petition for certiorari, the appeal papers shall be regarded and acted on as a petition for certiorari. 28 U. S. C. § 2103.

QUESTION PRESENTED BY APPEAL

I. Whether the phrase "exercise of reasonable care" and the word "misleading" provide a "sufficient warning" that Appellant's conduct was proscribed.

QUESTIONS PRESENTED BY PETITION FOR WRIT OF CERTIORARI

II. Whether the conduct of the agents of the state during the investigative phase of the proceeding constituted a violation of due process of law under the Fourteenth Amendment making a dismissal of the information mandatory.

III. Whether the pre-trial publicity was of such magnitude that the trial in this case was "inherently lacking in due process."

IV. Whether that portion of the charge to the jury which defined "materiality" amounted to a directed verdict as to one of the five elements of the crime thereby depriving Defendant of due process of law guaranteed by the Fourteenth Amendment.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 189.19 (2) (d) of the Wisconsin Statutes provides as follows:

> "189.19 Criminal liability.
>
> * * *
>
> "(2) Every director, officer, agent or employe of any issuer and every dealer, agent, investment adviser or other person shall be imprisoned in the state prison not exceeding 5 years, or in a county jail not exceeding one year, or fined not exceeding $5,000, or both, who shall directly or indirectly:
>
> * * *
>
> "(d) File or cause to be filed with the department any statement or representation of a material fact, which statement or representation he knows or in the exercise of reasonable care should know to be false or misleading;"

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

The Appellant and his co-defendant, Robert Kelly, were convicted by jury verdict of filing a false or misleading financial statement with the Wisconsin Department of Securities. This false or misleading statement of the financial condition as of March 31, 1964 of Allied Development Corporation (hereinafter referred to as Allied) was submitted by Appellant to the Securities Department for a dual purpose: 1. To afford the Director of the Wisconsin Department of Securities an opportunity to examine Allied's financial position prior to granting or denying an application by Allied for registration of its securities; and 2. To be made a part of the prospectus which would be furnished to the potential buyers of Allied stock once registration for public sale was obtained.

The Appellant and Mr. Kelly, President and Vice President of Allied respectively, were engaged in a complicated check exchange or check kiting scheme involving four separate checking accounts: Appellant's personal account; an Allied account; an account under the name of Brooks & Woodington, Inc., which was a company dominated by Appellant; and an account under the name of Hoard's Creameries, Inc., a company managed and operated by Mr. Kelly. In this manner Allied's cash position was so manipulated as to show a large fictitious balance as of March 31, 1964, the date of the financial statement. The Wisconsin Supreme Court found that "the jury could conclude that there was a very carefully contrived scheme to inflate Allied's account for the crucial March 31st date." (R. 110, Appellant's Jur. Statement, 124)

This scheme came to light as a result of an investigation into the affairs of Madison American Guaranty Insurance Company (hereinafter referred to as MAGIC). The Appellant was also active in the management of MAGIC, and when it became apparent during the investigation of that company that there were close financial ties between Allied and MAGIC, the Defendant's financial manipulations were uncovered.

These investigations began in August of 1964 and resulted in the then Attorney General of Wisconsin signing a criminal complaint against the Appellant on September 30, 1964, which complaint was given to the Dane County District Attorney with a request that he commence prosecution. The district attorney conducted his own investigation between September 30, 1964 and November 6, 1964, the date on which Appellant and Mr. Kelly were charged with the crime which is the subject of this appeal. A preliminary hearing was held from December 9, 1964 to December 22, 1964, and the two defendants were bound over for trial on December 29, 1964.

On April 5, 1965, prior to trial, the Appellant moved to dismiss the information filed against him on three grounds, only two of which are pertinent to this appeal: that the statute of which he was charged with violating was vague and indefinite in violation of the Fourteenth Amendment to the United States Constitution; and that the conduct of the agents of the State of Wisconsin during the investigative phase of this proceeding amounted to a violation of due process of law contrary to the Fourteenth Amendment to the United States Constitution. These motions are printed in Appendix B hereto, *infra*, p. 105. The

denial of these motions by the trial court and the subsequent affirmance of the decision by the Wisconsin Supreme Court constitute the basis for Questions I and II as stated by Appellee-Respondent.

Trial commenced on July 12, 1965, and a verdict of guilty was returned on July 29, 1965. During trial, Appellant submitted a requested instruction defining "materiality" (R. 29-31) which was refused, and he now contends the instruction given violated his constitutional rights. Appellant first raised the issue of whether he received a fair and impartial trial by motion for rehearing in the Wisconsin Supreme Court dated May 7, 1966. Said motion was denied by the state court for the reason that the issue was not properly before them, because it had been raised for the first time by motion for rehearing. (R. 156, Appellant's Jur. Statement 138-139)

SUMMARY OF ARGUMENT

A. (1) The charge to the jury in fact added to the statute the words which Appellant contends would make the negligence portion of the statute constitutional. Even without such clarification, the words "reasonable care" set a standard of conduct known to all men, particularly to the Appellant, who is a graduate lawyer.

(2) As defined in the charge to the jury, the statute requires the statement or representation to be misleading to either the Securities Department or a potential investor. The entire statute makes this obvious to any reasonable person; therefore the case of *Coplin v. United States*, 88 F. 2d 652, 657 (9th Cir. 1937), upholding the

use of the word "misleading" as not vague and indefinite, is authority for the case at bar.

B. (1) Inasmuch as the Defendant did not allege that his trial was unfair until he made a motion for rehearing in the state court, he is precluded from bringing the question to this court.

(2) Defendant's failure to bring to this court a record of any unfairness and his failure to raise the issue before the state court constitute potent evidence that he received a fair trial.

C. The publicity created by candidates for public office was directed at the opposing political party, and although it indirectly involved Mr. Woodington, such publicity did not prejudice his case. To dismiss the case because of such pubilicity punishes the public, for it would destroy by judicial decree the public's obligation to criticize the administration of criminal justice.

D. The Defendant did not state his objection to the instruction defining "materiality" in terms which fairly apprised either the prosecution or the courts that he claimed a violation of his Federal Constitutional rights. Although the question of "materiality" of the inaccurate representation is a question for the court rather than the jury, the state court construed the instructions to mean that the issue was given to the jury to decide. Inasmuch as the state court never reached the federal question (if any was raised), the decision was based on an adequate non-federal ground.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

I. THE ALLEGED UNCONSTITUTIONALITY OF THE WISCONSIN STATUTE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

There is a strong presumption of constitutionality of all statutes. *United States v. National Dairy Corp.*, 372 U. S. 29, 32 (1963). The whole purpose of the "Blue Sky Laws," of which this statute is a part, is to "protect the public by preventing the sale of worthless and fraudulent securities." *State v. Eisbach*, 263 Wis. 554, 556, 57 N. W. 2d 725, 726 (1953); *State v. Rogers*, 226 Wis. 39, 45, 275 N. W. 910, 913 (1937). This statute was, therefore, enacted by the Wisconsin Legislature in exercise of its police power to protect the health, safety and general welfare of the citizens. *Kreutzer v. Westfahl*, 187 Wis. 463, 482, 484, 204 N. W. 595, 603 (1925); *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 552 (1917).

A. *The Phrase "In the Exercise of Reasonable Care" is a Well-defined Standard of Conduct Known to All Men.*

The Appellant contends that a portion of the statute is unconstitutionally vague and indefinite because it requires him to exercise reasonable care in order to ascertain if information is false or misleading. He concedes that if the statue were to contain the additional italicized words as follows, it would be constitutionally certain:

> ". . . which statement or representation he knows or in the exercise of reasonable care *in his particular capacity* should know to be false or misleading."[1]

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[1]Appellant's Jur. Statement, 20.

The trial court instructed the jury that a failure to exercise reasonable care (negligence) is a:

> "want of, or failure to exercise, that care and caution which a person of ordinary intelligence and prudence usually exercises *in a like or similar situation, work or operation, under like or similar circumstances.*" (R. 22, emphasis added)

This instruction was approved by the Wisconsin Supreme Court, (R. 114)[2]. As construed and applied by the Wisconsin courts, the statute contains the essence of Appellant's suggested addition and is therefore constitutional by his own admission. Inasmuch as Appellant must, for the purpose of this appeal, accept the state court's construction of the statute (*Guaranty Trust Co. v. Blodgett*, 287 U. S. 509, 513 (1933); *Kingsley Pictures Corp. v. Regents*, 360 U. S. 684, 688 (1959)), there is no federal question with respect to the negligence portion of the statute.

The Defendant is an attorney at law who graduated with honors from the University of Wisconsin Law School; consequently, this definition of negligence and construction of the statute was obvious to him. He, therefore, "could reasonably understand from the statutory language that the conduct described in the [information] was proscribed by the Act." *United States v. National Dairy Corp.*, 372 U. S. 29, 34 (1963).

The issue is not if twelve members of a jury might disagree with one's choice of conduct, but rather, in determining whether a statute is vague and indefinite, it must be ascertained if there is a reasonable degree of certainty

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[2]Appellant's Jur. Statement, 129-130.

in the standard of conduct set out by the statute. *Boyce Motor Lines v. United States*, 342 U. S. 337, 340 (1952). Our statute deals with the conduct of a reasonable man, a standard which is litigated and argued in criminal and civil cases every day in our state and federal courts. The conduct of a reasonable man is a known standard for all persons in our society regardless of whether or not they are lawyers; thus, it is a sufficiently definite standard to include within a criminal statute.[3]

The words of the statute must have a fixed meaning in themselves, or a meaning made definite by a statutory or judicial definition, or by the context in which they are used, or some other legitimate aid to its construction. *Connally v. General Construction Co.*, 269 U. S. 385, 395 (1926). Thus, in a case relied on by Appellant, *United States v. Cohen Grocery Co.*, 255 U. S. 81 (1921), the Court considered a statute which said that it was unlawful for any person "to make any unjust or unreasonable rate or charge. . . ." *Id.*, at 81-82, n. 1. The Court held the statute unconstitutional, and it has been explained that the reason for this holding was that "the standard . . . was without a meaningful referent in business practice or usage." *United States v. National Dairy Corp.*, 372 U. S. 29, 36 (1963). The *Cohen Grocery Case* is, therefore, not applicable to the statute in question, because section 189.19 (2) (d) has a meaningful referent both in usage and in the common law —the standard of reasonable care.

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[3]This is "an extension of rather than a departure from the values symbolized by the mens rea concept." Packer, **Mens Rea and the Supreme Court**, Sup. Ct. Rev. 107, 145 (1962); see also A. L. I., **Model Penal Code, Tent. Draft No. 4, Comments § 2.02, pp. 126-127 (1956)**.

Appellant also relies on *Cline v. Frink Dairy Co.*, 274 U. S. 445 (1927), as authority for the proposition that the reasonable care standard is void as being too vague, but the Court in that case said:

> "But this does not justify in such a case holding the average member of society in advance to a rule of conduct measured by his judgment and action in respect to what is a reasonable price or a reasonable profit. It is true that, on an issue *like negligence*, i.e., a rule of conduct for the average man in the avoidance of injury to his neighbors, every one may be held to observe it either on the civil or criminal side of the court. *It is a standard of human conduct which all are reasonably charged with knowing* and which must be enforced against every one in order that society can safely exist." *Id.*, at 464 (Emphasis added).

There is, then, a distinct difference between what is a reasonable profit or price and whether a man's conduct constitutes reasonable care. It is clear that the latter standard is a constitutional one.

> "The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct," *United States v. Ragen*, 314 U. S. 513, 523 (1942).

B. *The Use of the Word "Misleading" in the Context of the Statute Afforded This Appellant a "Practical Guide to Permissible Conduct."*

Appellant contends that the word "misleading" is vague and indefinite because he cannot tell in advance of filing a financial statement whether it is the Director of the Securities Department who is not to be misled or if it is the potential investor who is not to be misled.[4] The jury was instructed that they had to find that the cash item on the balance sheet was misleading to *either* the Wisconsin Department of Securities or a prospective purchaser of stock. (R. 19-20) The Wisconsin Supreme Court found nothing erroneous in this instruction. (R. 113)[5] Inasmuch as the financial statement was required to be submitted to the Director of the Department of Securities, Appellant agrees that the director is one of the relevant addressees.[6] Section 189.13 and 189.17 of the Wisconsin Statutes make it equally clear that the public investor is not to be misled;[7] thus there are two addressees as stated in the instructions. Appellant knew that the financial statement, as a part of the prospectus, would be used by both the Department of Securities and prospective investors; consequently, Appellant in fact knew the answer to the dilemma which he attempts to create for this Court.

In *Coplin v. United States*, 88 F. 2d 652 (9th Cir. 1937), *Cert.* denied, 301 U. S. 703 (1937), the court of appeals had under consideration 15 U. S. C. § 77q (a) (2), which

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[4]Appellant's Jur. Statement, 24.

[5]Id., at 127-128.

[6]Id., at 24.

[7]Pertinent portions of these two sections are printed in Appendix A, infra, pp. 101-103.

was a part of the Securities Act of 1933. That particular section made it unlawful to sell securities,

> "by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." Securities Act of 1933, Title I, c. 38, § 17, 48 Stat. 84.

The court of appeals' opinion that the word "misleading" is not vague and indefinite was quoted by the trial court in its ruling on Appellant's motion to dismiss in the case at bar. (R. 16-17; Appendix B, *infra*, pp. 119-120) The word "misleading" is also found in 15 U. S. C. § 77x (Securities Act of 1933, Title I, c. 38, § 24, 48 Stat. 87), 78ff (a) (Securities Exchange Act of 1934, c. 404, § 32, 48 Stat. 904), and 79z-3 (Public Utility Act of 1935, Title I, c. 687, § 29, 49 Stat. 836). See *United States v. Guterma*, 189 F. Supp. 265, 274-275 (S. D. N. Y. 1960); reversed on other grounds, 281 F. 2d 742 (2nd Cir. 1960).

Appellant contends that an officer of a corporation "simply cannot determine whether particular statements will subject him to criminal liability."[8] Justice Holmes has answered a similar argument:

> "But we imagine that no one not in search of trouble would feel any." *United States v. Wurzbach*, 280 U. S. 396, 399 (1930).

In filing a financial statement, the Wisconsin Legislature holds the Appellant to the standard of a reasonable

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[8]Appellant's Jur. Statement, 24.

man—a standard which, like the word "misleading," is known and understood not only in law, but by every citizen in our community. The statute is, therefore, constitutional.

ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI

As Appellant indicates in his jurisdictional statement,[9] the remaining questions raised by his appeal papers constitute a petition for certiorari. 28 U. S. C. § 2103. As to those issues, Defendant must show that there are "special and important reasons" for a review on writ of certiorari. Rule 19 (1).

II. UNDER THE CIRCUMSTANCES OF THIS CASE, THE ISSUE OF WHETHER DEFENDANT RECEIVED A FAIR TRIAL DOES NOT INVOLVE "SPECIAL AND IMPORTANT REASONS" FOR REVIEW BY THIS COURT.

A. *The Question was Not Properly Raised Before the Wisconsin Courts.*

Defendant concedes in his argument that he did not raise the issue of the fairness of his trial until he made a motion for rehearing before the Wisconsin Supreme Court.[10] The Wisconsin Supreme Court denied the motion for rehearing because it was not timely. (R. 156)[11] This Court has consistently held that it will not review a federal ques-

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[9]Appellant's Jur. Statement, 2-3.

[10]Id., at 43.

[11]Id., at 139.

tion which is raised for the first time by motion for rehearing unless the state court actually entertains the question and decides it. *Bowe v. Scott*, 233 U. S. 658, 663 (1914); *American Surety Co. v. Baldwin*, 287 U. S. 156, 163 (1932); *Herndon v. Georgia*, 295 U. S. 441, 443 (1935); *Radio Station WOW v. Johnson*, 326 U. S. 120, 128 (1945). If this were not the rule, a party could present each of his constitutional issues to the state court on a piecemeal basis, and there would be no end to litigation.

An exception to the above rule exists if the motion for rehearing presented the first opportunity to raise the federal claim. *Herndon v. Georgia*, 295 U. S. 441, 444 (1935) and cases cited therein. No new and revolutionary law was created by the case of *Sheppard v. Maxwell*, 384 U. S. 333 (1966), to justify any contention that Defendant was, prior to rehearing, unaware of his right to a fair trial in the face of adverse publicity. The cases of *Irvin v. Dowd*, 366 U. S. 717 (1961); *Rideau v. Louisiana*, 373 U. S. 723 (1963); and *Estes v. Texas*, 381 U. S. 532 (1965), were available to Defendant as authority for raising the issue if he desired to do so. As pointed out by the Wisconsin Supreme Court in its per curiam opinion, the Defendant specifically declined to rely on the "rationale" of those cases in his original appeal. (R. 155)[12] Defendant, therefore, was aware of his right but failed to timely present the constitutional issue to the Wisconsin Supreme Court. It is not unfair or arbitrary to refuse to decide a question which the state court has not had an opportunity to adequately consider and decide; consequently, Defendant cannot now raise the issue as an afterthought because of *Sheppard v. Maxwell*.

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[12]Appellant's Jur. Statement, 137-138.

B. *There is No Merit to Defendant's Claim that He was Denied a Fair Trial.*

In an effort to make his trial correspond with the facts of the *Sheppard* case, the Defendant makes reference to the trial court's instructions to the jury about using news media during the trial and to the failure to sequester the jury.

The trial judge, however, did raise *sua sponte* the question of sequestration of the jury with counsel, and he ordered the jury sequestered. When it became difficult to select a jury, Mr. Woodington, after a conference with his counsel, withdrew his request for sequestration. (R. 145-148). If it was error, Mr. Woodington created it. If the judge had ordered the jury sequestered in spite of Mr. Woodington's request, this Defendant would now be alleging that ruling as a denial of his right to a fair trial.

Unfortunately, Mr. Woodington does not provide this Court with a record of the instructions by the trial court to the jury with respect to the news media, nor does he contend that any objections were made to the instructions given or that he requested other instructions. We must, therefore, conclude that the instructions in this case were more than the "suggestions" and "requests" criticized in the *Sheppard* case.

In addition, Defendant does not provides a record of the *voir dire* examination;[18] he makes no showing of extensive and prejudicial publicity during the trial; he shows no evidence of community prejudice; he specifically declined an invitation to move for a change of venue (R. 142-144;

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[18]He did attempt to supply such a transcript with his motion for rehearing. (R. 156; Appellant's Jur. Statement, 138).

R. 11-12[14]); and he made no motion for a continuance. All of these failures, along with the fact that Defendant did not believe the issue was important enough to raise by appeal to the state court, indicate that he in fact received a fair trial. *Stroble v. California*, 343 U. S. 181, 193-195 (1952); *Darcy v. Handy*, 351 U. S. 454, 463 (1956).

The trial of this case took place over eight months after charges were brought against the defendant, and in the entire record of this case, there is not a whisper of argument or speck of evidence that Mr. Woodington did not at that time receive the fair and impartial trial in the calm judicial atmosphere to which he was entitled.

III. THE CONDUCT OF THE AGENTS OF THE STATE DURING THE INVESTIGATIVE PHASE OF THIS CASE FOR WHICH DEFENDANT REQUESTS A DISMISSAL OF THE INFORMATION DOES NOT RAISE A QUESTION INVOLVING "SPECIAL AND IMPORTANT REASONS" FOR REVIEW ON WRIT OF CERTIORARI.

It must be conceded that there was publicity surrounding the investigative phase of this case. The Defendants issued press releases and purchased full page advertisements in the Madison newspapers. The then attorney general publicly criticized the governor, the insurance commissioner, and the district attorney for failure to assist in the investigation and for failure to act on his allegations. The district attorney answered his charges.

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[14]Appendix B. infra, pp. 114-115.

The general election which precipitated some of the publicity was held on Tuesday, November 3, 1966. Although the district attorney received the then attorney general's sworn complaints on September 30, 1964, he did not act on the charges until after the election; thus he prevented the actual court action from becoming a political issue. Subsequent to the election, there was no improper "conduct by agents of the state," and any publicity which occurred thereafter was straight news reporting.

Defendant would like us to believe that the publicity prior to the election was directed at him personally. It is obvious, however, that publicity emanating from the then attorney general said little about Mr. Woodington. It may be true that the then attorney general as a Republican was "out to get" the insurance commissioner and the governor as members of the opposite political party. There is, however, a distinct difference between the then attorney general's treatment of the Defendant and his treatment of the commissioner and the governor in the public press releases. The Democrats were accused of corruption, but Mr. Woodington's guilt or innocence was to be determined by a court of law.

In his public statements, the then attorney general continually refers to the issue being one of guilt or innocence of Mr. Woodington and Mr. Kelly. Never does the attorney general state that Mr. Woodington is guilty. Never does he recite the facts of the case. See *Sheppard v. Maxwell*, 384 U. S. 333, 337-342 (1966). Compare the then attorney general's conduct with that of the prosecuting attorney and other government officials in *Delaney v. United States*, 199 F. 2d 107 (1st Cir. 1952) (while defendant's criminal

trial was pending, a Congressional Committee conducted public hearings as part of an investigation of the defendant); *Stroble v. California*, 343 U. S. 181 (1952) (release to press by D. A. of defendant's confession and D. A. stating his opinion as to defendant's guilt); *Irvin v. Dowd*, 366 U. S. 717 (1961) (issuance of press releases by D. A. and the police after arrest); and *United States v. Denno*, 313 F. 2d 364 (2nd Cir. 1963), *Cert.* denied, 372 U. S. 978 (1963) (D. A. released information about confession and commented that the defendant was sane and must get the chair; prison records on the defendant were released to the press).

It is difficult to understand how the conduct of certain Republican candidates for public office and of the Madison newspapers can be labeled as actions of the State of Wisconsin. If criminal charges are to be *dismissed* because of the public comments of candidates for public office, members of political groups, and partisan newspapers; either democratic politics must go or the criminal jury trial must go—they could not exist together under such rules. Although Defendant attempts to liken his case to that of *Sheppard v. Maxwell*, this Court did not dismiss the charges because of the gross publicity in that case, but ordered a new trial. The decision of this Court in *United States v. Blue*, 384 U. S. 251 (1966), which reversed a lower court's dismissal of a criminal prosecution because of a violation of Fifth Amendment rights is equally appropriate to Defendant's demand for dismissal:

> "So drastic a step . . . would also increase to an intolerable degree interference with the public interest in having the guilty brought to book." *Id.*, at 255.

In its opinion, the Wisconsin Supreme Court considered at length two cases involving a motion to dismiss under circumstances similar to the case at bar—*Delaney v. United States*, 199 F. 2d 107 (1st Cir. 1952) and *Commonwealth v. Geagan*, 339 Mass. 487, 159 N. E. 2d 870 (1959), *Cert.* denied 361 U. S. 895 (1959). (R. 101-103)[15] The state court also relied on the decision of this Court in *Frank v. Mangum*, 237 U. S. 309 (1915). (R. 104-105)[16] Respondent cannot improve on the reasoning of those cases in contesting Defendant's position.

On the record which Defendant brings to this Court and on the record which he took to the Wisconsin Supreme Court, it must be concluded that Mr. Woodington received a fair trial; and "there could be no constitutional infirmity . . . if petitioner actually received a trial by an impartial jury." *Beck v. Washington*, 369 U. S. 541, 556 (1962).

IV. THE FEDERAL QUESTION RAISED BY DEFENDANT'S ATTACK ON THE CONSTITUTIONALITY OF THE INSTRUCTION DEFINING "MATERIALITY" WAS NOT PRESENTED TO THE WISCONSIN COURTS NOR DECIDED BY THE WISCONSIN COURTS.

The Wisconsin Supreme Court determined that the charge to the jury left to the jury the determination of whether the cash item on the balance sheet was a material representation and that the instruction as a whole was a correct statement of the law. (R. 111-112)[17] Defend-

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[15] Appellant's Jur. Statement, 109-113.
[16] Id., at 115-116.
[17] Id., at 126-127.

ant, however, now maintains that his constitutional rights were violated because he interprets one sentence of that instruction as constituting a directed verdict on one element of the offense. The Wisconsin Supreme Court disagreed with Defendant's interpretation of the meaning of the words used in the instruction and, therefore, decided the issue on an adequate and independent non-federal ground which is not reviewable in this Court. *Radio Station WOW v. Johnson*, 326 U. S. 120, 129 (1945); *Herb v. Pitcairn*, 324 U. S. 117, 125-126 (1945). This rule is enforced even when the non-federal grounds has been wrongly decided. *Wolfe v. North Carolina*, 364 U. S. 177, 195 (1960).

Equally dispositive of this issue, is the fact that at no time in the Wisconsin courts did the Defendant attack the instruction defining "materiality" as violating his federal constitutional rights. Defendant has the burden to show that he properly raised the federal question in the state courts.

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *Bryant v. Zimmerman*, 278 U. S. 63, 67 (1928)

Defendant claimed before the state courts that the instruction deprived him of his right to a jury trial.[18] Such gen-

[18]See for instance Defendant's Motion for a New Trial. (R. 43-45)

eral words do not raise a constitutional issue, but even if they did, it would be presumed to be an allegation of a violation of the state constitution. *Bowe v. Scott*, 233 U. S. 658, 665 (1914).

Even for his present appeal, Defendant, in his Notice of Appeal (R. 123) and statement of Questions Presented,[19] does not state that the instruction violated any particular portion of the United States Constitution. The argument in the Jurisdictional Statement, of course, does mention the Fourteenth Amendment; however, it is too late to raise a federal issue for the first time in this Court. *White River Co. v. Arkansas*, 279 U. S. 692, 700 (1929); *Whitney v. California*, 274 U. S. 357, 362 (1927).

Even if the issue had been properly presented to the Wisconsin trial and appellate courts and even if the state court had determined that the question of "materiality" was for the court to decide, such a decision would be clearly consistent with previous federal decisions. *Sinclair v. United States*, 279 U. S. 263, 298-299 (1929); *Sica v. United States*, 325 F. 2d 831, 835 n. 4 (9th Cir. 1963), *Cert.* denied, 376 U. S. 952 (1964).

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[19] Appellant's Jur. Statement, 4.

CONCLUSION

For the reasons stated, it is respectfully submitted that the appeal should be dismissed and certiorari denied.

Respectfully submitted,

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Counsel of Record for
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December 22, 1966

Additional Wisconsin
Statutory Provisions Cited

189.13 Registration of securities. (1) Securities shall be registered under this chapter upon separate application for each class of securities and in the manner provided in this section.

(2) The application for registration shall be signed by the issuer or a licensed dealer, shall be verified and shall be filed with the department. It shall contain such information and representations as the department may require as necessary or appropriate in the public interest or for the protection of investors.

(3) The department shall examine such application and the other papers and documents filed therewith, and may make or have made a detailed inspection, appraisal, audit, or other investigation of the property and affairs of the issuer. The department, upon payment of the expense reasonably attributable to its investigation, shall by order register the securities covered by such application if the following shall be made to appear to the department:

(a) The proposed plan of business of the issuer is not unlawful, dishonest, fraudulent, or otherwise contrary to public policy.

(b) The plan of financing is not or does not tend to be unfair, inequitable or fraudulent, or against public interest or the interest of investors.

(c) The articles of incorporation or association, declaration of trust, charter, constitution, by-laws, lease, con-

tract, or any instrument or indenture under which the securities are issued is not contrary to law or unfair, inequitable or fraudulent.

(d) The class of securities for which registration is sought bears a reasonable proportion to other classes of securities and to the fair value of the property and business, due consideration being given to the nature of the business, its earnings, its credit and prospects, the possibility that the fair value of the property and business may change from time to time, the effect which the issue of such securities may have on the management and operation of the business by reason of the relative amount of financial interest which the various classes of security holders will have in the business, and to other relevant matters.

(e) The commissions, fees and expenses to be incurred in connection with such issue or the sale thereof or the gross or net profit of any party or parties in connection therewith, is not unreasonable.

(f) The advertising matter to be used in the sale of the securities is not false, unfair, inequitable, fraudulent or misleading and gives fair and reasonably adequate information with reference to the securities and the issuer.

(g) It does not appear that any relationship exists between the issuer and the trustee in any instrument under which the securities have been or are to be issued, by virtue of which the interests of the trustees might be in conflict with the interests of purchasers.

(h) The methods to be used in the sale of the securities are not such as to be misleading, unfair, inequitable or fraudulent as to the purchasers, or against public interest or the interest of investors. Unless the foregoing shall be made to appear to the department, the department shall issue its findings and order denying registration.

* * *

(6) Certificates representing proportionate shares in a fund of securities shall be registered and sold in this state only upon compliance with such terms and conditions as the department may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * *

189.17 Department's powers; conditions in orders and licenses; rules, investigations and hearings; injunctions. (1) The department may, in any order or license issued under this chapter, impose such terms and conditions as may be necessary or appropriate in the public interest or for the protection of investors or to assure compliance with this chapter, and in any order of registration may, among other things, fix the price at which the securities may be sold and the maximum commissions or other compensation to be paid for their sale, and require that the proceeds from their sale be impounded under such terms and conditions as it may prescribe, that securities issued for intangible assets or for other assets at a price in excess of their market value be placed in escrow under such terms and conditions as the department may prescribe, that reports of sales of

securities be filed with the department at such times and in such form as it may prescribe, and that information available to the applicant concerning the issuer and its business, property and affairs be filed with the department at such times and in such form as it may prescribe. Any person acting under an order or license containing any terms or conditions shall be deemed to have accepted and waived all objections to such terms and conditions.

(2) The department for the purpose of carrying out the provisions of this chapter may make such rules and regulations as may be necessary or appropriate in the public interest or for the protection of investors or to assure compliance with this chapter.

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Motion to Dismiss Action of April 5, 1965 and Circuit Court Decision on Motion to Dismiss Action

MOTION TO DISMISS ACTION
(Formal Parts Omitted)

NOW COMES The above defendant, Robert C. Kelly, by Lawton & Cates, his attorneys, and the above defendant, Neil A. Woodington, by Immell, Herro, Buehner, DeWitt & Sundby, S. C. his attorneys, both of whom move the court to dismiss this action on the following grounds:

1. That section 189.19 (2) (d) of the Wisconsin Statutes is so vague and indefinite as to be unconstitutional under the due process clauses of Section VIII, Article 1 of the Wisconsin Constitution, and under the 14th Amendment to the United States Constitution.

2. That the activities of the State in conducting the investigation and prosecuting these actions constituted such outrageous misconduct as to be unconstitutional due to violation of the due process clauses of Section VIII, Article I of the Wisconsin Constitution and of the 14th Amendment to the United States Constitution.

3. That the magistrate conducting the preliminary examinations of the defendants did not have jurisdiction to conduct such preliminary examinations because the warrants and complaints were insufficient and did not consequently meet the constitutional requirements of the due process clauses of Section VII, Article 1 of the Wisconsin

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Constitution and the 14th Amendment to the United States Constitution.

Dated: April 5, 1965.

3 DECISION ON THREE MOTIONS OF THE DEFENDANTS TO DISMISS
(Formal Parts Omitted)

Wherever in this decision the Madison American Guaranty Insurance Corporation is referred to, it will be referred to as "MAGIC"; and wherever the Allied Development Corporation is referred to, it will be referred to as "Allied."

The defendants have moved as follows:

1. That the activities of the State in conducting the investigation and prosecuting these actions constituted such outrageous misconduct as to be unconstitutional due to violation of the due process clauses of Section VIII, Article 1, of the Wisconsin Constitution, and of the 14th Amendment to the United States Constitution.

2. That Section 189.19 (2) (d) of the Wisconsin Statutes is so vague and indefinite as to be unconstitutional under the due process clauses of Section VIII, Article 1 of the Wisconsin Constitution and under the 14th Amendment to the United States Constitution.

3. That the Magistrate conducting the preliminary examinations of the defendants did not have jurisdiction to conduct such preliminary examinations because the war-

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rants and complaints were insufficient and did not consequently meet the constitutional requirements of the due process clauses of Section VIII, Article 1 of the Wisconsin Constitution and the 14th Amendment to the United States Constitution.

4 The Information, to which the defendants have entered pleas of not guilty, reads as follows:

(The information was quoted.)

Section 189.19 (2) (d) reads as follows:

"(2) Every director, officer, agent or employe of any issuer and every dealer, agent, investment advisor or other person shall be imprisoned in the state prison not exceeding 5 years, or in a county jail not exceeding one year, or fined not exceeding $5,000, or both, who shall directly or indirectly:

"(d) File or cause to be filed with the department any statement or representation of a material fact, which statement or representation he knows or in the exercise of reasonable care should know to be false or misleading;"

MAGIC and Allied are corporations and, at the times involved, were both based in Madison; and, at the times involved, the defendants, Neil A. Woodington and Robert C. Kelly were officers of both corporations. Both corporations had filed applications with the Securities Department of the State of Wisconsin seeking permits authorizing the respective corporations to sell stock to the public. The Securities Department had jurisdiction with reference to the issuance of permits to sell stock; and the Commissioner of Insur-

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ance had jurisdiction with reference to the operation of MAGIC by reason of the fact that it is an insurance corporation.

As a result of various conferences and investigations, the State of Wisconsin has charged that the defendants filed with the Department of Securities an application on behalf of Allied for registration for securities which contained a statement and representation with respect to "cash," and that said defendants knew, or, in the exercise of reasonable care should have known, that the statement with respect to "cash" was false and misleading.

DECISION AS TO MOTION NO. 1

From the testimony taken with reference to this motion, including the various exhibits, it appears that as a result of the application filed with the Department of Securities, and as a result of the application filed with the Insurance Department, investigations by the Sescurities Department of Allied, and investigations by the Insurance Department of MAGIC followed. The then Attorney General and his office joined in the investigations of both Allied and MAGIC; and it also appears that the Banking Department likewise joined as a result of the other investigations.

The then Attorney General and other State officers did not agree on certain procedures and contentions and, as a result, releases to news media were made at various times; and the releases and statements would indicate that the then Attorney General and some of the other officers of

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the State did not agree as to findings and conclusions; and, as a result, the then Attorney General or Deputy Attorney General referred the matter to the District Attorney of Dane County; and the District Attorney of Dane County and the then Attorney General evidently did not agree immediately on what conclusions should be drawn from the investigations and findings.

It also appears that all of this information resulted in a substantial amount of publicity in newspapers and over the radio and by television. It further appears—and the Court takes note of the fact—that a very substantial portion of the publicity took place during the months of September and October, 1964, and that a general election took place on November 2, 1964, in which all state officers and county officers were involved. It likewise appears that the candidate for District Attorney of Dane County on the ticket opposing the then District Attorney made certain releases to the news media with reference to the actions or non-actions of the then District Attorney, and likewise caused to be filed a petition with the Circuit Court of Dane County for the calling of a Grand Jury to investigate the situation.

The exhibits, which consist of newspaper publicity, radio tapes, television tapes, news releases, letters and copies of letters, etc., are too numerous to set forth in detail. It must be noted that the defendants in effect joined in the dispensing of information to be published by news media. They made certain news releases and paid for full-page newspaper ads setting forth their contentions.

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It is fundamental that the state officers and departments, such as the Director of Securities, the Insurance
7 Department, Banking Department and the Attorney General, have the right, power and discretion to cause investigations to be made with respect to matters which come within their jurisdiction and it must also be recognized that the Attorney General is the chief law enforcement officer of the State. It must also be recognized that candidates for public office, running on one political ticket, have the right to criticize the operation of the government by the "ins" who may be candidates for the office on another ticket.

For this Court to make a finding that a state officer, such as any of the officers heretofore mentioned, acted improperly with reference to the matter here involved, would be to, in effect, subject his actions to a judicial determination without giving him his day in court.

This is not a motion to suppress certain evidence, nor is it a motion for change of venue of the trial of the cases. The defendants contend that the actions of the State, as a result of the investigations and prosecution, constitute such misconduct that both of the defendants, Kelly and Woodington, are denied due process of law under the 14th Amendment to the United States Constitution and under Section VIII, Article 1, of the Wisconsin Constitution. Paragraphs 15 and 16 of an affidavit filed by counsel for the defendants read as follows:

> "That the intentional and unnecessary publicity occasioned and generated by the State of Wisconsin in the investigation and prosecution of Robert Kelly

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and Neil Woodington has subjected these men to the
8 hatred, the scorn, the contempt, and the ridicule of their community and without question amounts to a violation of their right to fair treatment and has further interfered with the ability of these persons to receive a fair trial; that Robert Kelly and Neil Woodington were so cognizant of the prejudice generated in their community by the State of Wisconsin that these individuals at a prior proceeding in this case chose to waive the right of trial by jury which is one of our most fundamental rights; no word or deed can be more meaningful; the State unnecessarily and intentionally created an atmosphere where free men could not receive a fair and impartial trial by jury.

"That Robert Kelly and Neil Woodington have suffered irreparable harm occasioned through the unnecessary words and deeds of the State of Wisconsin; that they have been treated inconsistent with the basic requirements of due process of law, i.e., unfairly and in a manner calculated to interfere with their right to a fair trial; that because of this and because of other reasons referred to in paragraph 1 above, Robert Kelly and Neil Woodington request the only relief suitable to such misconduct, dismissal of the charge against them."

The defendants have cited numerous cases which, in the opinion of this Court, are distinguishable from the situation that here exists. Most of these cases involve illegal confessions, illegal searches and seizures, perjury known to be so by the prosecution, and mob rule of the trial, as jus-
9 tifying a dismissal of this case. In the large majority of the cases the Supreme Court of the United States did not

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dismiss the action but ordered a new trial. Where a new trial is ordered, errors that occurred are corrected, and violations of the constitutional rights of the defendants are preserved.

In Frank vs Mangum, 237 U. S. 309, the defendant was convicted in Georgia of murder. He appealed to the Georgia Supreme Court claiming that his constitutional rights had been denied, alleging that public sentiment was so great as to influence the jury. The Georgia Court did not find the evidence sufficient to justify a reversal of the case, and granting of a new trial. The defendant then brought a writ of habeas corpus in the United States District Court, which was denied; and the case was then appealed to the United States Supreme Court. The Court there said:

> "We, of course, agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term."

The Court further said:

> "The decisions of the Georgia courts in this and other cases show that such disorder is repressed, where practicable, by the direct intervention of the trial court and the officers under its command; and that other means familiar to the common-law practice, such as postponing the trial, changing the venue, and granting a new trial, are liberally resorted to in order to protect persons accused of crimes in the right to a fair trial by an impartial jury. The argument for appellant amounts

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to saying that this is not enough; that by force of the 'due process of law' provisions of the 14th Amendment, when the first attempt at a fair trial is rendered abortive through outside interference, the state, instead of allowing a new trial under better auspices, must abandon jurisdiction over the accused and refrain from further inquiry into the question of his guilt.

"To establish this doctrine would, in a very practical sense, impair the power of the state to repress and punish crime; for it would render their court's powerless to act in opposition to lawless public sentiment. The argument is not only unsound in principle, but is in conflict with the practice that prevails in all of the states, so far as we are aware."

The defendants also rely on the case of State vs Cory, 382 Pacific, (2d) 1019, which was a State of Washington case. In that case the Sheriff was found guilty of eavesdropping on a conference held by the defendant with his attorney. The trial had been held and the defendant had been found guilty. The court dismissed the case by virtue of the improper action of the sheriff in eavesdropping with reference to the lawyer-client conference. The case is distinguishable from the situation at hand. The evidence obtained by the prosecution by eavesdropping was of such a nature that the prejudice resulting to the defendant could
11 not be cured by a new trial and the reasoning there applied cannot be applied to the situation at hand.

The defendants in the instant case have not been denied due process of law if they can be granted a fair trial by jury. The situation is that both defendants have thereto-

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fore, in open court, waived the right of trial by jury. In the affidavit heretofore referred to, by counsel for the defendants, the following is stated:

> "That Robert Kelly and Neil Woodington were so cognizant of the prejudice generated in their community by the State of Wisconsin that these individuals at a prior proceeding in this case chose to waive the right of trial by jury which is one of our most fundamental rights; no word or deed can be more meaningful; the State unnecessarily and intentionally created an atmosphere where free men could not receive a fair and impartial trial by jury."

This Court recognizes that neither of the attorneys who now appear for the defendants were present in court when the defendants moved for a waiver of trial by jury and the State consented thereto. The Court likewise recognizes that one of the counsel was retained after this occurred. It could very well be that by virtue of the publicity which has taken place that it would be extremely difficult to impanel a jury in Dane County which would be fair and impartial. It is also conceivable that it might be difficult to impanel a fair and impartial jury in a county which adjoins Dane County. Prior to March 1, 1965, it was the law in Wisconsin that if the court, in a criminal case, found
12 that community prejudice existed in a county so that a fair and impartial jury could not be impaneled, that the Court could then exercise its discretion and transfer the trial of the action to an adjoining county. However, effective as of March 1, 1965, it is the law in Wisconsin that if the Court finds community prejudice to exist so that it

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would be extremely difficult to impanel a jury in a criminal case which would be fair and impartial, that the Court can then exercise its discretion and transfer the venue of the action—that is, the trial—to any county in the State where community prejudice does not exist. This Court is satisfied that there are counties in the State of Wisconsin where a fair and impartial jury could be impaneled for the trial of this action. The Court is likewise satisfied that if the record remains as it is, whereby the defendants and each of them have waived trial by jury, that a fair and impartial trial can be held before the Court.

It is the considered judgment of this Court that the defendants have not been denied due process of law and that the actions of the State of Wisconsin have not been of such a nature as to constitute a violation of the due process clauses of Section VIII, Article 1 of the Wisconsin Constitution and of the 14th Amendment to the United States Constitution.

It therefore follows that Motion Number 1 must be denied.

13 *DECISION AS TO MOTION NO. II*

The defendants contend that the negligence clause of Section 189.19 (2) (d) of the Statute is void for vagueness within the meaning of the due-process clause for the 14th Amendment because the standard of liability under the circumstances is wholly indeterminate and the conduct behind the statutory referrent "misleading material statement" is also unconstitutionally vague. Moreover, a portion of the

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mens rea clause the conduct behind the statutory referrent "misleading material statement" is unconstitutionally vague. Therefore, because the negligence clause is wholly vague and because a portion of the mens rea clause is partially vague, no prosecution may proceed under the terms of either clause and the information drafted pursuant to these portions of the statute must be dismissed.

The defendants contend, among other things, that subdivision (d) of Section 189.19 (2) of the Statute is so vague and indefinite that prosecution cannot follow. The Statute says that the defendants shall be punished if they file or cause to be filed with the department any statement or representation of a material fact which statement or representation he knows or, in the exercise of reasonable care, should know to be false or misleading.

The defendants contend that the statute is void for vagueness. There are numerous cases that deal with the use of the word "reasonable" in criminal statutes and the Court has considered all of those cited by counsel.

14 In the case of United States vs. Ragen, 314 U. S. 513, the defendants were charged with the wilful evasion of the tax laws. The statute provided that a deduction was permitted for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered." Under the statute dividends were not an allowable deduction. The defendants were charged with a scheme to evade corporation income taxes by paying dividends to

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stockholders and calling them commissions. Each one of the persons receiving such commissions had in fact done some work for the company; therefore the jury had to decide if the commissions were excessive or if they were reasonable allowances. The court held that the statute was constitutional and was not vague and indefinite. It said:

> "If, as the opinion below suggests, the only question that can properly be submitted to the jury is whether the entire deduction is fabricated, an unconscionable taxpayer can immunize himself from the criminal sanctions for tax evasion by the simplest of expedients. He need only find a legitimate item of deduction and then pad it as much as his purpose requires. By transforming the question 'Should any deduction have been made?' into 'Was the deduction made in excess of a reasonable allowance?' he can, if the theory accepted below be correct, largely destroy the deterrent effect of a penal statute passed by congress.
>
> "The mere fact that a penal statute is so framed as to require a jury upon occasion to determine the question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct."

In Commonwealth vs Reilly, a Massachusetts case, 142 N. E. 915, the constitutionality of the following statute was involved:

> "Any person who, with intent to sell or in any way dispose of merchandise, securities, service, etc. . . . makes, publishes, disseminates, circulates or places before the public . . . in a newspaper or other publication . . . an advertisement . . . which advertisement contains

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any assertion, representation or statement of fact which is untrue, deceptive or misleading, and which such person knew, or might on reasonable investigation have ascertained to be untrue, deceptive or misleading, shall be punished . . ."

The Court held that the statute was constitutional and did not violate the void for vagueness standard of the 14th Amendment. The Court said:

"The common law has established many tests for separating criminal from noncriminal conduct based on what a jury may think is reasonable. Self-defense as a justification in cases of homicide is made out by proof that the defendant had reasonable cause to believe, and in truth did believe, that it was necessary to strike in order to protect his own person, and that the mortal blow was given solely for that purpose."

16 The Court further said:

"Definitions of negligence not infrequently referred to the conduct of a 'reasonable man' as one of its elements . . . the person of ordinary caution and prudence often embodied in definitions of negligence is but another way of describing the reasonable person."

The Court further said:

"The statute here assailed prohibits as an inducement to business transactions the publications of untrue, deceptive or misleading statements or representations of fact. If the statute had stopped here, it would have been invulnerable under many decisions upholding statutes which forbid the doing of some act wholly

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apart from any intent . . . the present statute goes further and requires as an element to be found, before guilt can be established, either actual knowledge of the untrue, deceptive or misleading nature of the statement or representations by the defendant, or that such knowledge might have been acquired by him on reasonable investigation. It is manifest that here it is a fixed and ascertainable standard of guilt and that adequate information is given as to the nature and cause of the acts set forth in the accusation."

The use of the terms "reasonable care, false, misleading," etc., are words that have a common meaning and their use does not cause the statute to be unconstitutional for vagueness. In Coplin vs United States, 301 U. S. 703, [sic] the Court had this to say:

17 "Subjecting the words of section 77 Q (a) (2), upon which Count IX is specifically based, to critical scrutiny, we find no fatal ambiguity or indefiniteness, such as might prove a pitfall to any person, in the language of the appellants, 'attempting to obey the law.' No honest and reasonable citizen could have difficulty in understanding the meaning of 'untrue,' 'material fact,' 'any omission to state a material fact,' 'in the light of the circumstances under which they were made,' or 'misleading.' All these terms, it is true, call for interpretation in accordance to the facts of a given case. So do the terms 'malice,' 'probable cause,' 'self-defense,' 'negligence,' 'fraud,' 'duress,' 'justification,' and thousands of other expressions well established in the law.

"Isolated from their setting, any of the foregoing terms might be said to be 'indefinite' or 'uncertain'; but 'in the light of the circumstances under which' they

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are used, their meaning is clear enough to the reasonable and well-intentioned citizen. 'That is certain which may be rendered certain.' "

The Legislature has determined that in filing a registration statement with the Securities Department, the applicant shall be held to a standard of a reasonable man, which is a standard known and understood not only in the law but by every citizen. This is an ascertainable standard and a standard which may be used constitutionally in a criminal statute.

Due consideration has been given to the defendants'
18 argument with reference to the mens rea clause and with reference to their contentions as to blameworthiness. The Court being satisfied that the Statute is constitutional and does not deny the defendants due process of law within the 14th Amendment to the Constitution of the United States, nor under Section VIII, Article 1, of the Wisconsin Constitution, it follows that Motion Number 2 must be denied.

DECISION AS TO MOTION NO. III

The defendants contend that the Magistrate conducting the preliminary examinations of the defendants did not have jurisdiction to conduct such preliminary examinations because the warrants and complaints were insufficient and did not consequently meet the constitutional requirements of the due-process clauses of Section VIII, Article 1 of the Wisconsin Constitution and the 14th Amendment to the United States Constitution.

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The warrants were never served on the defendants by reason of the fact that the defendants surrendered voluntarily to the jurisdiction of the Magistrate; and, by reason thereof, this Court is of the opinion that the motion must be denied.

The District Attorney is hereby directed to prepare an order for the Court's signature denying each of the motions.

Dated: April 22, 1965.

Office-Supreme Court, U.S.
FILED
JAN 13 1967

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

NO. 801

NEIL A. WOODINGTON

Appellant-Petitioner

v.

STATE OF WISCONSIN

Appellee-Respondent

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL AND IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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January 10, 1967

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ARGUMENT

To make it easier to compare the arguments of the Appellee with those presented in this reply brief, the outline used by the Appellee in support of its motion to dismiss and in opposition to the petition for certiorari has been followed.

ARGUMENT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL

I. The Unconstitutionality of the Wisconsin Statute Presents a Substantial Federal Question.

Appellant's brief, contended that the negligence clause of Section 189.19 (2) (d) was void for vagueness. Appellant attempted to cite examples of additional phrases which might be inserted in the statute to help clarify the category of proscribed behavior and to help make the standard of liability more certain. The additional language suggested was to meet the argument that the statute was "as definite and certain as the subject matter would permit." However, no matter how many additional phrases are added, the cases cited in the jurisdictional statement point out that whenever negligence or reasonable care are used as a standard of liability in a criminal statute regulating economic activities, the United States Supreme Court will probably find the statute void for vagueness.

Appellee states that the Appellant concedes the constitutionality of the statute, because the trial court, through its instructions, corrected the deficiency in the statute. In making this assertion, Appellee takes but one of the changes suggested by Appellant. Even if Appellant were to admit Appellee's arguments with reference to the standard of liability - which we do not - Appellee has failed to deal with the other suggested change required to clarify the category

of proscribed behavior. Appellant's proposed amendments were merely suggestions as to how that statute could be improved. It is not appellant's obligation to rewrite the statute, and any rewriting should, as previously pointed out, drop the standard of reasonable care.

In this connection it is interesting to note the criminal penalties section of the Federal Securities Act:

> "Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof or any person who willfully in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both." (Emphasis supplied) 15 U.S.C. §77x Penalties.

No attempt was made by Congress in the Securities Act to assess criminal liability for negligence on the part of any corporate executive. A reading of the void for vagueness cases cited in Appellant's brief, plus the generally accepted requirement of criminal law that a person ought not to be labeled criminal unless morally blameworthy, adequately explains the omission of negligence or reasonable care as a standard of liability in this statute.

These criminal sanctions in §77x should be contrasted with remedies under §77k of the Securities Act which deals with civil liability and uses the standard of reasonableness.

It is also interesting to note the considerable protection a corporate executive has under the Federal Securities Law if he relies on the opinion of an expert, such as a certified public accountant. See §77h of the Securities Act. The preliminary hearing in this case, which was made a part of the pretrial motions to dismiss, which are a part of the record on appeal, clearly indicated (1) that the financial statement on which Appellant was convicted was prepared by external certified public accountants, (2) that these accountants were not misled by activities of the Appellant and (3) that Appellant did not prepare the financial statements, nor direct or control the manner in which they were presented. Appellant's jurisdictional statement on page 19 points up that the common fault of many of the statutes found to be void for vagueness by this Court is that the statute injects in the "governmental wheel" so much free play that in the practical force of its operation it is likely to function erratically and to result in a significant number of impermissible, public versus private - interest, resolutions which are beyond the effective discovery or appraisal of this Court. The fact that a prosecutor charged Appellant, and a jury found him guilty of filing a false or misleading financial statement in spite of the preparation of this certified statement by external certified public accountants, is good evidence of precisely the whimsical free play of the "governmental wheel"

which is criticized in the void for vagueness cases.

Appellee in its brief in support of motion to dismiss fails to recognize the distinction carefully drawn in Cline v. Frink Dairy Co., 274 U.S. 445 (1927) between (1) and issue like negligence--" a rule of conduct for the average man in the avoidance of injury to his neighbors"-- and (2) an economic issue involving reasonableness or reasonable care--one involving judgment and action in respect to what is a reasonable price or profit or what is reasonable accuracy in a financial statement. The United States Supreme Court has frequently invoked the void for vagueness doctrine in cases involving statutes regulating economic activities, statutes much like the statute involved in this case. Appellee on page 12 of its brief actually quotes a portion of the Cline case recognizing the distinction. Appellant's jurisdictional statement at page 18 quotes other language from the Cline case recognizing the distinction. In an article titled The Use of Indefinite Terms in Statutes, Freund, 30 Yale L. J. 437 (1921) the author says such terms as reasonable, proper, sufficient, suitable and necessary represent the lowest grade of certainty when used in statutes. They involve either an appeal to judgment or a question of degree. They provide a flexibility which, "(p)resumptively (is) more appropriate to civil than to criminal legislation." (p. 438) It is not sufficient to state as Appellee does on page 11 of his brief in support of motion that because the standard of reasonable care has a meaningful referent in the common law

that the Cohen Grocery case has no applicability here. The term "reasonable" also has a well-defined meaning in the common law, but this Court has found it too uncertain when used in certain criminal statutes involving economic regulations. Perhaps Appellee's arguments to the effect that the standard of reasonable care is a sufficiently precise standard might apply if we were dealing with civil rather than criminal liability. Writers on the subject are quite uniform, however, in stating that the standard of reasonable care is not a proper standard of liability in a statute imposing substantial criminal penalties. As one author noted, the concept that terms with a common law meaning are sufficiently definite in criminal statutes is an old saw, a dogma of void for vagueness lore; his comments indicate it is not to be considered seriously today. Void for Vagueness Doctrine, 109 U. of Penn. L. Rev. 67 (1960) at p. 88, fn 103.

In the Void for Vagueness Doctrine, supra, at pages 74 and 75, the author points out that "vagueness alone, although helpful and important, does not provide a full and rational explanation of the case development in which it appears so prominently... in the great majority of instances the concept of vagueness is an available instrument in the service of other more determinative judicially felt needs and pressures."

The article then goes on to discuss the conditions under which the vehicle of vagueness will be utilized. It concludes that the

"vagueness doctrine is chiefly an instrument of buffer zone protection". p. 85. It "has been used...almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms." p. 75. "And, where conviction is under state statute...(a lawyer) may perhaps succeed in invoking the invalidating rule of Lanzetta--provided that his client's conduct is not particularly evil as viewed by the prevailing moral temper of the Court, that the ambiguity he urges is not seen by the Court as a mere pretext for evasion, and that other, clearer legislative methods of achieving the end sought by the contested statute appear to the Court possible and equally practicable." (parenthetical material supplied) pp. 86, 87. Appellant's jurisdictional statement discusses these other methods on pages 26-28.

In one of the footnotes to the above quotation the author notes, "It seems significant that the void for vagueness doctrine has been successfully invoked before the Court only by convicted or putative offenders against the economic regulatory laws--white collar crimes, not malum in se-- or against various crimes of speech..." The author then cites other possible explanations of the correlation and says: "But beyond these explanations there seems to have been a persisting tendency of the Court to look to ethical overtones in vagueness situations. See Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925); Miller v. Strahl, 239 U.S. 426 (1915);" and others. p. 87. "This same conception is instinct in the theme of 'scienter'

or mens rea which runs through the vagueness cause... Yet it is evident that unless the Court has been fooling itself in these cases, the 'scienter' meant must be some other kind of 'scienter' than that traditionally known to the common law...a clarificatory 'scienter' must envisage not only a knowing what is done but a knowing that what is done is unlawful, or, at least, so 'wrong' that it is probably unlawful." fn 98 p. 87.

"The language which no decision can definitely clarify and which consequently has been the virtually exclusive target of void-for-vagueness nullification is that which falls within Professor Freund's third category: terms of judgment and degree. Here are Cohen's 'unreasonable' charges, Cline's 'unreasonable' profits,... Herndon's 'reasonable' time... These are phrases of inherent discontrol. Not all such statutes have been voided, of course. Many legal responsibilities may be made to turn---as many common-law duties have traditionally turned---upon the 'reasonableness' of conduct as viewed by some trier of fact. But it is in this realm, where the equilibrium between the individual's claims of freedom and society's demands upon him is left to be struck ad hoc on the basis of a subjective evaluation... that there exists the risk of continuing irregularity with which the vagueness cases have been concerned." pp. 92, 93.

"To say that the void for vagueness rule is applicable to noncriminal proceedings,

> however, is not to say that the seriousness of what is at stake will not be an extremely significant variable... in the determination of whether a statute will survive a vagueness attack all other factors being equal, it is probable that a statute imposing penal sanctions will be looked at more severely than one whose operation is of less drastic effect... Winters v. New York, 333 U.S. 507, 515 (1948), contains language to the effect that the standards of certainty in statutes punishing for offenses is (sic) higher than in those depending primarily upon civil sanction for enforcement; and it is indicative that except in Small... no vagueness attack on a non-criminal statute has succeeded."

Vagueness attacks upon state legislation have, in general, been far more successful than vagueness attacks upon federal legislation, which may in part explain U.S. v. Ragen, 314 U.S. 513, (1942), cited on page 12 of Appellee's brief in support of motion. The Supreme Court has considerably more flexible power of control over the enforcement of federal legislation than it does over state legislation and the author of the Void for Vagueness Doctrine, supra. at pp. 82, 83, indicates that this may be an explanation for the apparent conflict between the Ragen case and certain other cases where the Court has held state statutes void for vagueness.

The case of Boyce Motor Lines v. United States, 352 U.S. 337 (1952) cited by Appellee on p. 11 of its motion is easily distinguishable

from the instant case by the fact that the statute there directed that "whoever knowingly violates" the Regulation shall be subject to fine or imprisonment. The standard of reasonable care was not involved. The statute involved was "sustained, in part on the notion that the requirement of guilty knowledge clarified it." Void for Vagueness Doctrine, supra. p. 87, fn 98. The same observation can be made as to the case of United States v. Ragen, 314 U.S. 513 (1942) cited by Appellee on page 12 of its brief. The Ragen case involved a statute which provided in part: "any person who willfully attempts in any manner to evade or defeat any tax... shall...be guilty of a felony..." (Emphasis supplied)

Appellee cites the case of Coplin v. United States, 88 F. 2d 652, (9th Cir. 1937), cert. denied, 301 U.S. 703 (1937) as authority to the effect that the word "misleading" affords the Appellant a practical guide to permissible conduct. The Coplin case cited on page 13 of Appellee's brief involved a violation of the Securities Act of 1933. It is easily distinguishable from the instant case by the fact that the Securities Act does not involve the standard of reasonable care in assessing criminal penalties. Only knowing violations are criminally punishable. In the instant case, the term "misleading" appears in both the mens rea and the negligence clause. As pointed out on page 22 of the jurisdictional statement, the vagueness of the negligence clause is compounded by applying an indeterminate standard of liability to a referentless category of proscribed behavior.

The Coplin case makes it clear that identical words in one context might be constitutionally sufficient and in another context constitutionally deficient. The Appellant has gone into detail in its jurisdictional statement as to the ambiguities involved in the use of the word "misleading" in the statute pertinent in this case. The Coplin case is not persuasive here because of the differences between the statute and standard of liability involved in that case and the statute and standard of liability involved in the instant case. It seems that the words "from the standpoint of investment profitability to a reasonably prudent investor" or similar words are absolutely essential to clarify the category of proscribed behavior when an uncertain word such as "misleading" is used in a criminal statute involving reasonable care as a standard of liability.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

II & III The Question of Whether In All Probability Appellant Did Not Receive A Fair Trial Involves "Special And Important" Reasons for Review By This Court Especially In View Of The Conduct Of Agents Of The State During The Investigative Phase Of This Case.

The arguments made by Appellee under headings II and III of brief in opposition to petition are answered here and hence the headings are combined.

Appellee contends on page 15 of its brief in opposition to petition that Appellant concedes that he did not raise the issue of the fairness of his trial until he made a motion for rehearing before the Wisconsin Supreme Court and cites page 43 of Appellant's jurisdictional statement in support of this statement. A reading of that page clearly shows no such concession. The fact that Appellant argued for dismissal of the information in his original argument before the State Supreme Court certainly does not warrant the conclusion that he was conceding the fairness of the trial. It is an intolerable burden to put upon a defendant on appeal to prove that he had an unfair trial. Appellee evidently claims such a concession by appellant because the appellant at page 25 of its original brief to the State Supreme Court stated that he was not alleging categorically that it was impossible to find twelve persons who might be able to approach Appellant's innocence or guilt with an open mind. The appellant continued in his brief to the State Supreme Court, "The evidence shows that proposition will always be uncertain, and that the uncertainty has been created by the State even though under 14th Amendment due process they have an affirmative duty to systematically insure the reliablility of the guilt determination process in criminal trials. While the State maintains that its agents did not consciously manipulate Appellant or the news media, the Court can draw its own inferences as to motives and objectives of the State from the record before it."

Appellant recognized the impossibility of

the burden of showing unfairness. The Sheppard case clearly acknowledges that identifiable prejudice to the accused need not be proved in order to establish a denial of due process. Lack of due process can be demonstrated where "the totality of circumstances" raises "such a probability that prejudice will result that it is deemed inherently lacking in due process". Sheppard v. Maxwell, 384 U.S. 333 (1966).

The appellee's statement that the appellant concedes that he did not raise the issue of fairness overlooks the following facts. Appellant, prior to trial, at a special hearing on Appellant's motions, raised the question of whether a fair trial could be had in view of the activities of the Attorney General of the State of Wisconsin. Throughout the trial Appellant attempted to introduce evidence of the political motivation behind the charges, and the prejudicial publicity. After trial appellant moved for a new trial as well as for dismissal.

The fact that Appellant sought a dismissal of the charges in the initial hearing before the State Supreme Court certainly does not indicate that the issue of a fair trial was not raised by him. Dismissal was sought by Appellant on the grounds that there was a great likelihood that a fair trial could not be held any place in the state because of the statewide nature of the Attorney General's prejudicial activities, statements, advertising and campaigning. Dismissal is still sought but at the least Appellant is asking for and should receive a new trial. The issue of the fairness of the trial here was part

of the Appellant's defense from the very beginning of these proceedings. Appellant has always contended that a fair trial was most unlikely once the Attorney General had finished his "tar and feather job."

Even if it were conceded that Appellant first raised the issue of the fairness of the trial in the motion for rehearing before the State Supreme Court - a concession not made - the fact that the Sheppard case was decided June 6, 1966 and the original Supreme Court decision was filed June 7, 1966 certainly should be of interest to this Court.

The Sheppard case was not before the Wisconsin Supreme Court at the time of its original decision. It was argued on rehearing, but the State Supreme Court never fully considered that case because of its view that appellant's failure to ask for a change of venue or a continuance barred him from asking for a new trial on appeal. The State Supreme Court stated on rehearing:

> "We consider that appellant, in presenting his appeal, argued only, on this aspect of the case, that because the pretrial publicity instigated by the state's agents might tend to deprive him of a fair trial, the case should be dismissed in order to discipline the state's agents, but chose not to attempt to convince us of the fact nor the probability that such publicity did influence the jury, so as to entitle him to a new trial."

As stated in our jurisdictional statement, it is our contention that the State Supreme Court was unduly technical in not considering a new trial for the Appellant after it had decided not to dismiss the information. There has never really been a determination by the State Supreme Court as to whether or not appellant had a fair trial because that court refused to acknowledge that probability of prejudice is so great in certain instances that the activities of the prosecutor will be deemed inherently lacking in due process. It seems beyond argument that when the full power of the state was brought to bear upon appellant in pretrial statements, activities and publicity as are found here, that prejudice to a great degree certainly resulted to Appellant.

In discussing the Supreme Court cases for the 1965 term, a Harvard Law Review article stated:

> "Ultimately, the case for imposing greater restraints on police and prosecutors may rest on a broader notion -- that public officials should be held to higher standards of conduct than private citizens. Of course, 'state action' is involved whenever a defendant is convicted by a biased jury regardless of the source of prejudice. But since government has immense power and since it sets an example for private citizens, it has a special duty not to 'play an ignoble part' by itself fostering publicity. Moreover, newspapers in practice recognize an obligation to publish major statements issued by public officials; elimination of

this pressure might encourage more responsible treatment of prejudicial information without impairing the press' ability to provide critical commentary when the situation warrants it."

"Even though the foregoing arguments may justify restricting public officials more stringently than newspapers, there can be no justification for imposing the same stringent standards on the defendant and his counsel. . . Also if an indicted defendant may not defend himself in the press or attack police and judicial misdeeds before the trial, he is left faced with a public accusation to which his only reply can be a formal plea of not guilty." The Supreme Court, 1965 term, 80 Harv. L. Rev. 180 (1965) at 185.

Appellant can not improve on the reasoning of the above Law Review article in answering appellee's contention that appellant's public statements bar him from complaining about those of the state's chief prosecutor.

A reading of the press releases of the Attorney General as outlined in Appellant's brief and as found in much greater detail in the scrapbook presented at the hearing on the pretrial motion to dismiss certainly negates the argument by Appellee that the Attorney General's conduct here is less flagrant than in other cases cited by the Appellee. The Attorney General's conduct here, on the contrary, is much more flagrant than that found in any

cases cited by either the appellant or the appellee. See pages 30-35 of appellant's jurisdictional statement. The conduct of other office seekers on the Republican ticket has been mentioned in appellant's jurisdictional statement because the Attorney General could reasonably foresee this result of his vicious unfair public attacks on the appellant.

As pointed out in the jurisdictional statement appellant initially sought sequestration of the jury and later, when it became apparent that there would be great difficulty in obtaining jurors for a long trial if the jury were to be sequestered, appellant, for business reasons, consented to proceed without sequestration. Sequestration of jury is a more effective remedy than a continuance or a change of venue, but not in a case involving a long trial; it may induce exasperation as dangerous to the defendant as publicity. The main defect of sequestration is that it can not cure pretrial publicity.

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury...all practising lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453 (1949).

It is the contention of the appellant here that none of the normal remedies of change of venue, continuance, or sequestration were really remedies for him in view of the massive and virulent attacks upon him by the State's chief prosecuting officer and in view of the desperate straits into which previously successful businesses of the appellant were plunged by these attacks.

Appellee in its brief in opposition to petition on page 17 states that it is unfortunate that appellant did not provide this Court with the record of the instructions by the trial court to the jury with respect to the news media so that they can be compared with those of the Sheppard case. We, therefore, set forth here the instructions of the trial court to the jury along with the judge's instructions at the beginning of the trial in the Sheppard case.

The trial court's instructions in this case follow:

> "The jury will be instructed at any adjournment on any date to the effect that you should not read about this case in any newspapers; you should not listen to any radio; you should not look at any television that may have any announcement with reference to it; you should not discuss the case with anyone; you should not discuss the case amongst yourselves until you are instructed and retire to the jury room for deliberations; and to all the jurors, both in the box and in the courtroom, you are instructed--and the Court will repeat this instruction--that if anyone ever attempts during the progress of this trial to discuss this case or the purported facts with you, you will so inform the Court when you return to court, and the Court will then take charge." Trial Record p. 337.

After several repetitions by the trial judge they usually tended to be more cursory.

The judge's admonitions at the beginning of the Sheppard trial follow:

> "I would suggest to you and caution you that you do not read any newspapers during the progress of this trial, that you do not listen to radio comments nor watch or listen to television comments, insofar as the case is concerned. You will feel very much better as the trial proceeds... I am sure that we shall all feel very much better if we do not indulge in any newspaper reading or listening to any comments whatever about the matter while the case is in progress. After it is all over, you can read it all to your heart's content... At intervals during the trial, the judge simply repeated his 'suggestions' and 'requests' that the jury not expose themselves to comment upon the case." Sheppard v. Maxwell, supra.

The Court stated as to the above instructions, "They were allowed to go their separate ways outside of the court room without adequate directions not to read or listen to anything concerning the case." Sheppard v. Maxwell, supra. The similarities between the admonishments are great.

IV. The Federal Question of Whether Appellant Was Denied A Jury Trial In Violation Of The United States Constitution Was Presented To The Wisconsin Courts And Decided Upon.

The appellant requested certain instructions to the trial court on the question of material fact. As outlined in the jurisdictional statement,

the trial court directed a verdict on the question of whether the cash item was material. The appellant requested a new trial on the grounds that the judge's instructions directing the verdict on a material element of the crime charged was error. On his appeal to the State Supreme Court, the appellant presented this issue to the State Supreme Court and said "the above instruction amounted to a directed verdict as to one element of the crime: the materiality of the statement... to direct a verdict on any material element of a crime is always error. State v. Evjue, 254 Wis, 581, 37 NW (2d) 50 (1949)." Page 76 of appellant's brief in the Wisconsin Supreme Court.

On rehearing in the State Supreme Court, the appellant again argued that the materiality instruction amounted to a directed verdict on this particular element of the crime.

Appellee in its brief in opposition to petition on page 22 quotes from Bryant v. Zimmerman, 278 U.S. 63 (1928) and it is the contention of the appellant that the language quoted by appellee makes it clear that no particular form of words or phrases is essential if the claim of invalidity is brought to the attention of the State court with fair precision and in due time. Appellant contends that by arguing to the State Supreme Court that the instruction amounted to a directed verdict it properly presented the federal constitutional question of denial of a trial by jury. Perhaps it would have been better to cite the various portions of the federal constitution upon which appellant was relying, but there can be no doubt that the issue was presented and argued and decided

upon by the State Supreme Court. Appellee admits on page 22 of its brief that Appellant claimed before the state courts that the instruction deprived him of his right to a jury trial. We think this concession is sufficient to permit this court to act upon the federal constitutional question presented.

CONCLUSION

The unconstitutionality of Section 189.19 (2)(d) clearly presents a substantial federal question. It seems apparent that it is unconstitutionally void for vagueness.

The question of whether in all probability the appellant did not receive a fair trial involves special and important reasons for review, particularly in view of the conduct of state agents during the investigative phase of this case. Abuses of the rights of the criminally accused by the highest legal officer of the state should certainly be scrutinized as closely as abuse of such rights by the "cop on the beat."

The federal question of whether appellant was denied a jury trial was properly before the state courts and should be reviewed by this court.

Appellant respectfully requests that the appellee's motion to dismiss the appeal be denied and that the United States Supreme Court hear this appeal.

Respectfully submitted,

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Attorney of record for Appellant

January 10, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

WOODINGTON *v.* WISCONSIN.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 801. Decided February 13, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.